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POLITICAL STATUS OF PUERTO RICO

HEARINGS

BEFORE THE

COMMITTEE ON
ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

S. 710, S. 711, and S. 712

TO PROVIDE FOR A REFERENDUM ON THE POLITICAL STATUS OF PUERTO RICO

JULY 11, 13, AND 14, 1989

Part 3

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POLITICAL STATUS OF PUERTO RICO

TUESDAY, JULY 11, 1989

U.S. SENATE,
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, DC.

The Committee met, pursuant to notice, at 9:40 a.m., in room SD-106, Dirksen Senate Office Building, Hon. J. Bennett Johnston, chairman, presiding.

OPENING STATEMENT OF HON. J. BENNETT JOHNSTON, U.S. SENATOR FROM LOUISIANA

The CHAIRMAN. The hearing will come to order.

We continue today on hearings on Puerto Rican status. Earlier this year Senator McClure and I introduced three bills, S. 710, 711, and 712 each designed to give a choice to the people of Puerto Rico on the future of political status in that island.

S. 710 lead to a referendum which would—whether people of Puerto Rico would chose in one word independence, commonwealth or statehood.

S. 711 would contain a general description to be followed by a period of negotiation on the three statuses.

S. 712 was originally introduced with the description of the status left blank, but was to fill in completely the description of status under the three alternatives so that if finally confected and passed by the Congress, the people of Puerto Rico when they finally passed or finally made a choice under S. 712, that choice would be self-executing.

Frankly, when we originally introduced the three bills while we favored the alternative under S. 712, we thought it was a very daunting task, probably unattainable task because the amount of work, number of choices to be made were so tremendous.

As time has gone on there, the hearings we have held up here, the hearings we have had in Puerto Rico, the excellent work we have received from each of the three parties, and I really do want to commend the three parties and their leaders for excellent work in this respect, I believe we can achieve the goal of defining the three statuses.

Now, there has been a lot of question about whether the Congress will really go along with the idea of self-determination. I believe the Congress will because I believe this country is so committed to self-determination. If we do not stand for anything else in this country, we stand for self-determination, the right of a people to choose.

The people of Puerto Rico are American citizens. They are permanently American citizens, and they deserve the kind of choice which S. 712 will give.

Now, having the aspirations on the part of the people of Puerto Rico to make this choice and having the desire, the willingness on the part of Congress and the administration to do it does not mean that it automatically happens. There are still tremendous hills to climb, big choices to make, difficult legal formulas to be put together, confected, drawn up, reviewed, criticized, changed, modified and to stand the test of critical analysis. All of that takes a lot of time.

It is going to take a lot of cooperation, it is going to take a tremendous dedication on behalf of not only this committee and its staff, which has already invested that kind of time and application, but it is going to take the cooperation of the administration, the participation of the administration.

I am pleased that Assistant Secretary Ed Dennis, who is going to be the coordinator from the Justice Department of this testimony has indicated a full desire and willingness to engage in this kind of complete dedication to the task.

I am not very pleased with OMB which has held up some of this testimony. Some of the testimony, for example, from the State Department we did not get until midnight last night. Now, considering that we have asked for this weeks, months ago, that really does not pass the test of adequate participation. However, we are willing to excuse initial shortcomings from different departments of the administration, and we hope that OMB gets the word if they are going to participate, they have got to do it now.

What we have in mind—in fact, what we have scheduled is three days of hearings this week from the administration, today, Thursday, and Friday. We are here to find the answers from the administration to the technical questions to the extent that they disagree with something, we want alternatives.

We do not want vague talk because we have a markup scheduled on July 19th. I hope we can make that schedule of July 19th. It is going to be, again, a very daunting task.

Now, what Senator McClure and I have discussed, and I hope the committee will endorse, is that when we finish these hearings we want to put together a Chairman's mark which is, in effect, a draft of our recommendations, and we would hope that that would be used as the markup vehicle. You need to use something as a markup vehicle. The original bills contained simply blanks in the descriptions.

Then we got the recommendations of the three parties, the so-called wish lists, and they filled those in and we had a bill printed. That is really not the bill. That is a bill for the convenience of the committee that we are using. But we would hope that the markup vehicle will be one which Senator McClure and I—Senator McClure and I, of course, have sat through every minute of these hearings both here and in Puerto Rico. Our staffs have worked and have been in contact with all Senators on this committee as well as Senator Moynihan, who has been, of course, active in this whole process. But we hope to be able to come together with an initial recommendation.

That, of course, will have no status other than assuming the committee goes along with us, that draft will have no status other than be the mark which will be used for further amendment, and we hope we will be able to give the committee some good recommendations on that. And I think there is already in Senator McClure's discussions and mind a high degree of being in unison on these questions, but many, many questions, of course, have yet to be resolved.

I dwell at some length on this question of schedule to underline to all parties, to all members of this committee, to the members of the administration that to the extent you have some ideas, to the extent you have some recommendations, make them now. If you want to be a part of this process, make your recommendations now and be ready to give us drafts. You may have to work overnight. Our committees have been doing that. We have been doing that. It is going to take that kind of dedication.

The reason is, of course, that after this bill leaves this committee—and I believe we will be able to report legislation out of this committee—I certainly hope so—that there are other committees of jurisdiction, particularly the Finance Committee that has jurisdiction over social security, 936, Medicare, the important programs that are so vital here.

It is going to take them some period of time—I hope not too long. I hope they will exhibit the same kind of dedication that we do.

I might say to the members of the committee that it is my hope that we will have a draft of recommended language dealing with matters that are outside of the scope of this committee. That is to say, on 936, for example, I think we should have a recommendation as to how that should be drafted and the reason is that this committee has primary jurisdiction over status, and status which does not include 936 and federal programs is only a part of the picture and does not give a complete recommendation.

By giving recommended language on 936 and other matters without the jurisdiction of this committee, we did not mean to intrude on anyone else's jurisdiction. We simply must have a recommendation of the whole piece of the pie because if there were changes in 936, then other parts might have to be changed which are within our jurisdiction in order to balance those out.

So, we look forward to some intense hearings this week, some productive hearings. The hearings thus far, the cooperation thus far from the three parties has frankly exceeded my expectations, and they give me great optimism, great optimism that we will be able to complete our work this Congress and have a product out there for the people of Puerto Rico to make a choice, a self-executing choice on. I hope that is so.

[The committee received the following comments on S. 712 from the Department of Veterans Affairs and the General Services Administration:]

THE SECRETARY OF VETERANS AFFAIRS
WASHINGTON

SENATE COMMITTEE ON
ENERGY AND NATURAL RESOURCES
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AUG 1989

Honorable J. Bennett Johnston
Chairman, Committee on
Energy and Natural Resources
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

The enclosed paper contains the comments of the Department of Veterans Affairs regarding the draft amendment in the nature of a substitute for S. 712.

Except for the matters noted, we have no objection to the remainder of the bill, and defer to the other Departments affected.

The Office of Management and Budget advises that there is no objection from the standpoint of the Administration's program to the submission of this report on S. 712 to the Congress.

Sincerely yours,

Edward J. Derwinski

Edward J. Derwinski

Enclosure

COMMENTS REGARDING DRAFT AMENDMENT IN THE NATURE OF A SUBSTITUTE FOR S. 712

The Department of Veterans Affairs offers the following comments regarding the draft amendment in the nature of a substitute for S. 712:

- Section 204 - State Title to Lands and Property

  We believe this section should apply to major Federal facilities. It should not, however, apply to individual mortgage liens on specific properties, or individual properties acquired following foreclosure of a Federally assisted loan. Accordingly, we recommend the following new subsection:

  > (d) This section does not apply to any ownership interest in land, including any lien, obtained by the United States, or any officer or agency thereof, incident to a loan made, insured, or guaranteed by the United States, or any officer or agency thereof.

- Section 205(c) - Taxation of Federal Property

  This subsection provides that Puerto Rico, if it adopts the statehood option, may not tax any Federal land. This codifies a generally accepted common law sovereign immunity principle. It must be noted, however, that the United States has waived sovereign immunity in a number of instances. For example, 38 U.S.C. § 1820(a)(6) permits states to tax properties acquired by VA in connection with the home loan program. This absolute prohibition on taxing any lands now owned or acquired in the future by the United States could be construed as granting Puerto Rico less rights than any other State. Accordingly, we recommend adding "Except as otherwise provided by law," before "No" in line 5 of page 9 of the draft substitute.

- Section 308(a)(1) - Property Rights Following Independence

  This subsection would generally transfer all property owned by the United States to Puerto Rico following proclamation of independence. Our remarks regarding section 204 equally apply here.

Administrator
General Services Administration
Washington, DC 20405

40th Anniversary

July 31, 1989

SENATE COMMITTEE ON
ENERGY AND NATURAL RESOURCES
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The Honorable
J. Bennett Johnston
Chairman, Committee on
  Energy and Natural Resources
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

The General Services Administration (GSA) wishes to submit the views of this agency on the Johnston-McClure amendment in the nature of a substitute on S. 712, a bill "To provide for a referendum on the political status of Puerto Rico." GSA's views on the subject amendment are set forth in the enclosure.

The Office of Management and Budget has advised that, from the standpoint of the Administration's program, there is no objection to the submission of this report to your committee.

Sincerely,

Richard G. Austin
Acting Administrator

Enclosure

ENCLOSURE

S. 712, 101st Congress
Draft Johnston/McClure Amendment

This enclosure reflects the views of the General Services Administration (GSA) concerning a draft amendment in the nature of a substitute to S. 712, a bill "To provide for a referendum on the political status of Puerto Rico."

If enacted in the form in which it is proposed to be amended, S. 712 would be known as "The Puerto Rico Status Referendum Act" and would provide for an island-wide referendum in which qualified voters of the Commonwealth of Puerto Rico would select from among several political status options -- Statehood, Independence, Commonwealth, or none of them.

GSA has no comment concerning the need for or overall merit of S. 712 as it is proposed to be amended; however, we would like to express some views regarding certain real property disposal provisions contained in the draft amendment. Briefly summarized, each of the political status options provides for disposition of Federal real property located in Puerto Rico at variance with the provisions of the Federal Property and Administrative Services Act of 1949 (Property Act), as amended. GSA notes that, with respect to the independence option, Federal excess property disposed of pursuant to the Property Act is outside the scope of GSA's responsibilities. GSA therefore defers to the views of other concerned agencies regarding that option.

The Property Act is the statute governing the disposition of most Federal real property, including that located in Puerto Rico. Under that law, GSA is vested with the responsibility for administering an economical and efficient system for the Federal Government to promote the most effective use of real property by Federal agencies and the orderly disposition of real property it no longer requires.

Under normal procedures, real property which is no longer needed by a Federal agency is reported to GSA as excess real property. GSA first notifies other landholding Federal agencies that such property is available for further Federal utilization. If we receive a properly justified request for further use of the property for Federal purposes, it is transferred to the requesting agency.

If there is no further Federal requirement for a property, it becomes available for disposal as surplus real property. Under existing provisions of law, eligible State and local governmental units and certain nonprofit institutions may acquire surplus real property for restricted local public purposes at monetary discounts of up to 100 percent where such purposes reflect the highest and best use of the property. Eligible public uses include public park and recreation, historic monument, public airport, health, education, correctional facility, highway, and wildlife conservation. Also, in accordance with the provisions of Title V of the Stewart B. McKinney Homeless Assistance Act, Federal properties determined suitable by the Department of Housing and Urban Development are made available for homeless assistance purposes.

In addition, State and local public bodies may purchase real property for unrestricted use through preferential negotiation on the basis of its estimated fair market value. Under certain limited circumstances, GSA is also authorized to negotiate the sale of real property with private firms and individuals. Property which is not needed for further Federal purposes and which is not transferred for non-Federal public purposes is generally offered for sale to the public by GSA through competitive bid offerings and public auctions.

As a matter of policy, GSA opposes legislative provisions which result in the disposition of Federal real property at variance with existing law. The Property Act established a centralized and uniform system for the economic and efficient utilization and disposal of the Government's real property. The structure of the Property Act and the Federal Property Management Regulations promulgated by GSA were designed to assure the fullest use of federally owned real property and that real property assets of the Federal Government are judiciously and equitably managed or disposed of in a manner that serves the best interests of both the Government and the general public.

We understand the desire of Puerto Rico to acquire title to Federal real property holdings in order to advance its economic and social development and to preserve its distinct historical heritage and cultural personality. From a broader perspective, however, we believe Puerto Rico's overall interest can be accommodated under the existing real property program and that through the development of a close working relationship with the Commonwealth of Puerto Rico, changes in the law or disposal procedures are unnecessary.

Accordingly, we wish to offer the following particular remarks and recommendations concerning specific real property disposition provisions contained in Titles II and IV of the draft amendment to S. 712.

TITLE II - STATEHOOD

Section 204(c) - Within 5 years after the date of admission of the Commonwealth of Puerto Rico as a State of the Union, each Federal agency shall submit a report to the President and Congress concerning the need for real property retained under its control and any such property no longer needed by the Federal Government shall be conveyed to the Commonwealth at no cost.

GSA Position - Section 202(b) of the Property Act, 40 U.S.C. 483(b), provides for continuous survey of real property by each executive agency to determine if such property is excess to its needs. Once reported excess, the property is then screened with other Federal agencies for possible further Federal use. If the property is determined surplus to the needs of the Federal Government, it is then made available to State and local bodies for appropriate public purposes authorized by the Property Act and related legislation. Thus, the purposes of the proposed legislation can be accomplished under existing law. Section 204(c) bypasses the existing process and at the same time places additional administrative burdens on Federal agencies, the Congress, and the President of the United States.

The section also overrides provisions of the Property Act by providing for the conveyance of real property to the Commonwealth of Puerto Rico without compensation or use restrictions. Such conveyances could result in "windfall profits" for the recipient.

As a matter of policy, GSA generally opposes the distribution of federally owned property pursuant to special legislation since the Property Act, a law of general application, usually best serves the interest of the Government and the public in this regard. We therefore recommend that section 204(c) of Title II be revised to read as follows:

"(c) In accordance with section 202 of the Federal Property and Administrative Services Act of 1949, as amended, each Federal agency having control over any land or property located in Puerto Rico shall continuously survey property under its control to determine which is excess property, and promptly report such property to the Administrator of General Services for disposition pursuant to the provisions of that Act."

TITLE IV - COMMONWEALTH

Section 412 - By March 15, 1990, the President shall report to Congress concerning eight federally owned properties specified in the section. The report shall include an assessment of the Federal need for each property, the costs and/or benefits of disposal of each property, and the comments of the Government of the Commonwealth of Puerto Rico regarding each property. Unless the President finds that there is a national interest which requires continued Federal ownership of each property, then he shall provide for the transfer of such properties to the Commonwealth of Puerto Rico according to such terms as he determines to be appropriate with respect to each.

GSA Position - Section 202(b) of the Property Act provides for continuous survey of real property by each executive agency to determine if such property is excess to its needs. Once reported excess, the property is then screened with other Federal agencies for possible further Federal use. If the property is determined surplus to the needs of the Federal Government, it is then made available to State and local bodies for appropriate public purposes authorized by the Property Act and related legislation. Thus, the purposes of the proposed legislation can be accomplished under existing law. Section 412 bypasses the existing process and at the same time places additional administrative burdens on Federal agencies, the Congress, and the President of the United States.

The section also overrides provisions of the Property Act by providing for the conveyance of real property to the Commonwealth of Puerto Rico without compensation or use restrictions. Such conveyances could result in "windfall profits" for the recipient.

As a matter of policy, GSA generally opposes the distribution of federally owned property pursuant to special legislation since the Property Act, a law of general application, usually best serves the interest of the Government and the public in this regard. We therefore recommend that section 412 be deleted from the draft amendment to S. 712.

The CHAIRMAN. Now, before calling on our first witness, I want to call on the ranking minority member of this committee that has been a full partner in every step of the way on this legislation, Senator McClure.

STATEMENT OF HON. JAMES A. McCLURE, U.S. SENATOR FROM IDAHO

Senator MCCLURE. Thank you very much, Mr. Chairman. I have only a few remarks to make before opening the hearing today, and I appreciate the comments you have made, Mr. Chairman.

I would like to start out by congratulating you for the amount of work that you have put into this legislation, and the information which the committee has received so far. You and your staff have certainly been more than just dedicated to getting this job done.

I wanted to stress the difficulty that you have already outlined in getting this legislation completed in this Congress. I, too, share the feeling which you expressed earlier that we simply have to stress the fact that those parties in the administration who have a legitimate interest in the outcome of this legislation, and who we would hope and expect would have a legitimate interest in informing this committee as to the options as they see them, will have to work long and hard in order to get those recommendations to us in a timely manner.

I know that it is very difficult for the administration to coordinate between all departments and agencies on one issue let along on the alternatives. And what we have set forth is an extremely difficult task. I do not mean to dwell on that, but I do mean to emphasize it enough to recognize the difficulties they have in trying to present testimony to us with the absolutely necessity of them understanding just how tight this time frame is and necessarily so.

I know that some will believe that it is unduly optimistic to expect that we can complete action in this committee by the end of this month. I want to repeat that; the end of this month. If we are to get this job done, we just about have to complete the committee work before the August recess in order that the other committees with jurisdiction will have time to do what they have to do both at staff level and within the committee, and I would suspect, knowing the schedule of other committees, they will have difficulty too in getting their committee work done and their staff work done in order to advance this proposal so that we can pass it yet in this Congress.

I want to stress the fact that this is a cooperative effort between yourself and myself and other members of this committee. I hope all members of the committee will be prepared to meet and to mark up this legislation, and I certainly do support the process which you have outlined in trying to draft, expecting to draft a proposal for the committee to use as a markup vehicle so that we start from a beginning point that will move as rapidly as possible toward conclusion.

To draft three alternatives, self-executing options, is to some an impossible idealistic attempt on our part. I do not think it is either impossible or unduly idealistic. I think the Congress of the United States and the federal government of the United States must present the people of Puerto Rico with three genuine options, which we will be prepared to accept once they make their choice known.

If we do not do it that way, we are asking them to indulge themselves in an exercise that is extremely difficult politically and extremely dangerous for us to undertake unless we are deadly serious about the result. I think we must be serious. I must stress to the members of the administration not just the bare fact of a disappointment, but I want to stress that disappointment that it was midnight last night before we got the initial statement.

I am concerned that unless we have a process working in the administration which does better than that, we are not going to be as well advised as we have a right to expect the administration to give us in assistance. This approach has the support of the President of the United States, and he has reiterated that upon more than one occasion that it is his desire as well that the people of Puerto Rico be given a choice. The President has stated what his preference is, but he has stated repeatedly that he wants the people of Puerto Rico to make that choice, as do I.

But before any choice can be given to the people of Puerto Rico, this committee must first be able to understand what the administration's position is on the many difficult and complex issues which must be contained in each one of three different self-executing options.

And again, I cannot stress too strongly the necessity for people in the administration to be prepared to work overnight if necessary to get the information to us and the recommendations to us in a timely manner so that we may legislate in a proper way.

Thank you very much, Mr. Chairman. Again, my congratulations to you for your determination and your hard work.

The CHAIRMAN. Thank you very much, Senator McClure.

Senator Nickles.

STATEMENT OF HON. DON NICKLES, U.S. SENATOR FROM OKLAHOMA

Senator NICKLES. I have a very brief comment. I compliment both you and Senator McClure for the amount of work, effort and time, and I think time is of essence, and you have invested a lot of time. I apologize for not being able to attend the hearings that you had in Puerto Rico. I had previous commitments, but I am interested in the hearings today and in the hearings the balance of this week.

You have outlined a very ambitious schedule, one that at first glance, it seems to this Senator, is very ambitious because just in looking at a lot of the problems and challenges that we have in the various proposals, they are complex, and I hope that we do not move so fast that we might make some mistakes that we would regret.

Again, I compliment you for your earnest desire to move forward, but I do hope we will take enough time to analyze these questions both with the administration and with people from Puerto Rico and others to make sure that we move forward deliberately and also do a good job in coming up with the various proposals so the people of Puerto Rico can make the appropriate decisions.

The CHAIRMAN. Thank you very much, Senator Nickles.

Our witness this morning is the Honorable Edward S. Dennis. He is Acting Deputy Attorney General. General Dennis, we are glad to have you. Please proceed.

STATEMENT OF EDWARD S.G. DENNIS, ACTING DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. DENNIS. Mr. Chairman, it is certainly my pleasure to represent the administration in this very important hearing.

As you have stated in your opening remarks, the President is very much in favor of the approach of having the referendum process be one through legislation that would be self-executing.

The choices that the people of Puerto Rico will be presented with are basically three choices, the first being statehood, the second being independence, and the third being an enhanced commonwealth choice.

The administration supports self-determination by the people of Puerto Rico through the form of a referendum, and certainly that choice by the majority of the people of Puerto Rico voting in that election will be respected.

The President has made it very clear that the administration supports statehood for Puerto Rico. However, the President recognizes that that choice is one that only the people of Puerto Rico can make. It is certainly a very exciting prospect to have Puerto Rico as possibly our 51st state with a new star on the flag and a new state joining a union of states dedicated to liberty and to justice for all.

The prospect that Puerto Rico would join our nation as the 51st state, a nation that has demonstrated that we can truly be one nation out of many people, a nation that has drawn its strength from a tradition of an open society that is hospitable to diversity but steadfast in its allegiance to the Constitutional principles of governance that keep us firmly on the path of freedom and equality of opportunity.

Yes, we do support the status of statehood for the people of Puerto Rico and the island of Puerto Rico.

We would like them to join in the constitutional bond with the other 50 states of the United States.

However, this is not a responsibility to be taken lightly.

This is a very significant step in the history of Puerto Rico, and we certainly recognize that a majority of the people of Puerto Rico must fully support whatever option is selected in the referendum process.

Toward that end, we believe the referendum process must present clear choices. Those choices must be realistic. They must be workable, and they must present economically viable options.

As drafted, S. 712 has many provisions that are essentially extraneous to the ultimate goal of giving the people of Puerto Rico such a choice, a goal that should not be obscured by confusing and unnecessarily detailed provisions.

I would point out, Mr. Chairman, that in your remarks this morning, in your opening remarks this morning, you have succinctly stated the goal of this legislation, and that is to be self-executing upon the choice of the Puerto Rican people, the people of Puerto Rico through the referendum. The legislation would hopefully set that island on a course either towards statehood or independence or the maintenance of a commonwealth status.

However, we do believe as a general matter that an attempt to resolve all of the issues and the contingencies that might arise in conjunction with any of these statuses should be approached with great caution. One, we should not make promises or hold out expectations that are unconstitutional, that are legally or politically unrealistic, or that are economically unsound.

I would like to highlight some of the provisions that would require revision before this important process goes forward. Please note that this discussion includes what we believe to be the most important, significant legal constitutional and policy issues presented by the bill and is not intended to be exhaustive.

However, we are certainly prepared to meet the Committee's timetable with regard to the markup process and intend to be very supportive insofar as the details of the legislation as it takes shape. Further, as you know, the Departments of Treasury, State, Defense, Agriculture, Health and Human Services, Transportation, and the U.S. Trade Representative will also be appearing before the Committee to address particular concerns they have with the legislation.

Let me assure you on behalf of the entire Administration that we are eager to work with the Committee to establish clearly defined status options that can be presented to the Puerto Rican people.

The issue of statehood, and the definition of statehood, the choice of statehood as defined in Title II of S. 712 is an option that is the least problematic from a legal and constitutional standpoint. We do have several comments on the bill as drafted, but on a whole, Title II currently represents a realistic status option.

Obviously, the status of statehood is one that has been defined over more than 200 years of our constitutional form of government. We believe that the people of Puerto Rico are certainly very familiar with the status of statehood. There is a clear and well-defined body of law relating to the rights and obligations and limitations on the powers of the states.

However, there are several provisions that we feel are not consistent with the status of statehood, and I would like to point those out at this time. One of the issues relates to the exploitation of the continental shelf.

Under Section 5(b), Puerto Rico, as a new State, would be granted "the exclusive right to explore, exploit, lease, possess and use all seabed natural and mineral resources lying within the 200 mile economic zone continental shelf boundary around the waters of the archipelago of Puerto Rico."

No state enjoys such wide authority over its coastal areas. The use and development of the United States coast and continental shelf is governed by the Submerged Lands Act of 1953, and by the Outer Continental Shelf Lands Act of 1953. Under these statutes, the states generally are entitled to utilize submerged lands within a three-mile boundary, while the Federal Government retains jurisdiction over the balance of the continental shelf.

The legislation admitting both Alaska and Hawaii to the Union specifically required that they be covered by this statutory scheme. And the Administration believes that the same provisions should be included in any act admitting Puerto Rico to the Union.

Another issue that arises under the option of statehood is the question of economic adjustments. We recognize that the realistic needs to have an economically viable transition from commonwealth to statehood is an important consideration. A realistic transition is in the interests of the Federal Government as well as of Puerto Rico. Such transition provisions have been adopted in previous statehood bills.

For example, when Alaska was admitted to the Union, the Federal Government made very significant land grants to the new state to help establish it on a sound fiscal footing. The Administration believes that a transition to statehood should result in no net revenue loss to Puerto Rico. The Administration would support a transition grant to Puerto Rico.

But the budgetary treatment of a transition to statehood should be consistent with sound budget discipline. And we feel that these principles should be the guiding principles in arriving at a realistic scheme of economic adjustments through the period of transition from commonwealth status to statehood status.

There is another provision in Title II which is also at odds or at least goes beyond the status held by the fifty states. This would be a provision in Section 16(c) which would require Congress to pass an omnibus act to insure that the people of Puerto Rico attain equal social and economic opportunities with the residents of the several states.

The Constitution of the United States we believe, through the equal protection clause of the Fourteenth Amendment, really provides the framework within which citizens are guaranteed the equal protection of the laws and equality of opportunity both economic and political, and that that has served us well over these generations, and that that is the standard under which all fifty states are judged or at least the citizens of all fifty states operate.

In addition, of course, Puerto Rico, as a state will have representation, voting representation in the Congress of the United States and in the Senate of the United States. And through that process, we are confident that a state of Puerto Rico can hold its own among the other fifty states in terms of the debate over public issues both economic and social.

We would certainly welcome them as a State if that choice is made the insight of the people of Puerto Rico through their representatives insofar as our social arrangement is concerned. But it is through that political vehicle of representation, through our constitutional process, that the states are able to be heard and that the process of governance is carried out with the appropriate safeguards against any discrimination, against any particular state or any particular region of the country.

So, therefore, we do not support this language insofar as the omnibus act is concerned, but merely would like to point out that our constitutional processes have been structured with the recognition that it is through the process of voting, through the process of representation in our Congress, that each area of our nation has a voice in the policies that would affect each state and each region of our nation.

The next option is the option of independence. The independence option we feel is certainly one option that the people of Puerto Rico can choose, but we feel that the provisions in Title III of S. 712 are really not consistent with full independence. And we feel that the language of the legislation which would establish the referendum process should make it clear that independence is full independence with all that that represents.

Obviously, as with the process of moving to possible statehood, there would be a period of transition. Likewise, if the option of independence is chosen, there would be a period of transition. But we feel that no mistake should be made that independence would mean that Puerto Rico would become a separate nation, a separate people, certainly enjoying I am sure a friendly and cooperative relationship which has been our history with the United States.

But that independence would represent a radical departure from the commonwealth status, and that the people of Puerto Rico would be setting a course of complete sovereignty from the United States with all the risks, and advantages and disadvantages that that brings with it.

There are a number of specific provisions I am sure that are of concern, probably chief among which is the issue of citizenship. Under the independence provisions of S. 712, Puerto Rican residents would be entitled to maintain a dual citizenship in both the United States and the new republic of Puerto Rico. Allowing Puerto Rican residents to retain United States citizenship while becoming citizens of the new republic obscures the reality of independence for the Puerto Rican voter more than any other provision.

Allowing such dual citizenship, while not unconstitutional, is fundamentally inconsistent with granting full independence to the island. Moreover, under accepted principles of international law, a transfer of sovereignty of a territory transfers the allegiance of those who remain in the territory from the former sovereign to the new sovereign.

We believe that it is well within the authority of the Congress to require the residents of Puerto Rico at the time of independence, and who continue to reside there, to choose between their United States citizenship and citizenship in the newly independent Puerto Rican republic. Requiring such a choice would be consistent with the Supreme Court's jurisprudence with respect to United States citizenship under the Fourteenth Amendment.

Citizenship acquired pursuant to the Fourteenth Amendment by birth or naturalization in the United States is constitutionally protected. The Supreme Court has held, however, that Congress has authority to condition citizenship acquired outside of the territorial boundaries of the United States, outside of the states, the District of Columbia, or a territory that actually has been incorporated into the United States.

Puerto Rico was not incorporated within the United States upon its acquisition from Spain, and the Congress has never purported to affect such an incorporation. As a result, the citizenship of Puerto Rican residents is statutorily protected by the Jones Act rather than by the Fourteenth Amendment. Such citizenship is subject to reasonable statutory regulations. Consequently, it would be within Congress' authority to require Puerto Rican residents to choose between their United States citizenship and citizenship in the new republic.

In summary, although in terms of a transition, there is the possibility of allowing for freedom of choice insofar as those who currently hold citizenship that is protected by the Jones Act, it should be clear to those that are voting in the referendum that they are setting the island of Puerto Rico and its residents on a course of full independence, and that over time, the citizenship in the republic of Puerto Rico would be the dominant citizenship of those who would reside in Puerto Rico.

And that dual citizenship, as a permanent status for those future generations in Puerto Rico, should not be deemed a realistic option. In addition, under the independence choice, there is the issue of a treaty of friendship and cooperation which is also set forth in Title III of S. 712.

Section 6.1 would require that all the provisions of the bill scheduled to take effect after the proclamation of independence be embodied in a treaty of friendship and cooperation between the republic of Puerto Rico and the United States. We feel that if the independence option is chosen, that although we would certainly expect there would be a friendly and cooperative relationship between the United States and the new republic of Puerto Rico, that a specific definition of that relationship must be carried out through the normal diplomatic processes, the constitutional processes for actual negotiation, enforcement, and implementation of a treaty arrangement.

Therefore, it is our position that any treaty arrangements with the new republic of Puerto Rico, if that choice is chosen, would have to await that choice being chosen and should be the subject of normal diplomatic negotiations.

Finally, there is the issue of voter qualifications for delegates to the constitutional convention that would be responsible for drafting a constitution for a new republic of Puerto Rico. As we view this referendum election, this process is a process that would be set in motion under a federal statute. It would be a federal election, and therefore, the qualifications of the voters for that referendum should be controlled or is controlled by constitutional standards.

In addition, assuming that independence was the choice of the people of Puerto Rico, we believe that the voting requirements also should be controlled by constitutional principles. We do not believe we should endorse standards that are non-constitutional standards for either the purposes of the referendum or for a subsequent vote for delegates to a constitutional convention in shaping the form of government for a new republic.

Finally, there is the issue of commonwealth status, an enhanced commonwealth status which is set forth in Title IV of S.712. There are a number of different provisions in Title IV. These would alter the commonwealth status of Puerto Rico as it is currently defined, and in fact, I think it would be fair to characterize this enhanced status as being one that would allow the Commonwealth of Puerto Rico greater autonomy than it has now insofar as federal laws are concerned and the enforcement of those laws, the applicability of those laws and provisions to the Commonwealth of Puerto Rico.

For example, in many instances, federal legislation would be inapplicable to the island. The President's right to appoint federal officials in Puerto Rico would be restricted to a list provided by the Puerto Rican governor. Puerto Rico would be authorized to negotiate its own air transportation treaties.

The functions of the National Labor Relations Board in Puerto Rico would be taken over by a Puerto Rican labor relations board. Special protection would be provided for Puerto Rican copyrights, and the governor of Puerto Rico would be empowered to issue United States passports.

This list is not exhaustive, but it does reflect issues that are of concern to the Administration. In many respects, the enhanced commonwealth option would render the island virtually independent of the United States authority in many areas. It also would grant Puerto Rico much greater advantages than any other area under United States sovereignty that is not a state.

So long as Puerto Rico remains under the sovereignty of the United States, it is essential that this fact be made clear beyond peradventure. Any statements that the island is autonomous in the bill must make clear that this autonomy is limited to internal affairs, and that as a commonwealth Puerto Rico remains under the sovereignty of the United States. Congress retains the authority to legislate with respect to Puerto Rico, and federal law may not be preempted or nullified by the local government.

We think that this is absolutely essential, again, getting back to the point that the choices to be made by the Puerto Rican voters in this referendum should be clear choices and they should be choices that are accurately represented and should not represent either unrealistic options which cannot or will not be made actually available should that choice be voted.

Some of the specific provisions which give us pause involve the treatment of federal statute and regulations. Under subpart 4 of Title IV there is a discussion of the applicability of federal laws to Puerto Rico. Under current law, federal statutes not locally inapplicable within the meaning of Section 734 of the Puerto Rico Federal Relations Act have the same force and effect in Puerto Rico as in the United States.

Under Title IV, however, this process would be turned on its head and any federal statute would be inapplicable to Puerto Rico unless it is consistent with the policy of allowing Puerto Rico greater autonomy, more equitable participation in federal programs, greater participation in Federal Government decisions affecting the island, provide safeguards for Puerto Rico's distinct cultural identity, and has greater regard for the economic, cultural, ecological, geographic, demographic and other local conditions of the Commonwealth of Puerto Rico.

Under this provision, the great bulk of federal legislation would become locally inapplicable to Puerto Rico. Only if Congress makes a certification of an overriding national interest would a particular federal law apply to Puerto Rico. Similar provisions would apply to federal rules and regulations.

Further, under this part, the governor of Puerto Rico would be granted an unprecedented and truly extraordinary power to certify that a federal law or a federal regulation is inapplicable to Puerto Rico. The subsection would thereby confer on the governor a significant authority pursuant to the laws of the United States. Such authority, however, may be vested only in an officer of the United States.

The governor of Puerto Rico is elected by the people of Puerto Rico. He is not an officer of the United States. The power envisaged by subsection (c) and (f) of subpart 4 therefore cannot constitutionally be vested in the governor of Puerto Rico.

There is another part that deals with federal appointments and representation. Subpart 13 of Title IV would provide that the highest ranking federal officials in Puerto Rico must be appointed by the president from a list of eligible candidates recommended by the governor of Puerto Rico. A requirement that the President make appointments only from a list of candidates submitted to him is objectionable as a matter of constitutional law.

As noted above, the appointments clause of the Constitution requires that officers of the United States, i.e., those persons who exercise significant authority pursuant to the laws of the United States be appointed by the president subject to the advice and consent of the Senate. Inferior officers may be appointed by the President alone where the Congress has vested this authority in him or in the heads of the Executive Branch departments.

The president's authority to nominate principal officers cannot be qualified by law. This subsection 13 purports to permit the governor of Puerto Rico to share in the President's appointment power and to accord to the governor significant authority under the laws of the United States.

Accordingly, we believe that the requirement that the president nominate officials from a list submitted by the governor of Puerto Rico is unconstitutional and should be deleted. There are similar provisions related to special treatment regarding labor relations laws and special treatment regarding passports and special treatment regarding other federal functions.

I will not go into those in any detail except to ask that my entire statement be made a part of this record. But in general, I wanted to make clear that although we are pointing out what we feel are troublesome areas in S.712, that conceptually, we do agree that we should work towards a bill that would create a referendum which would be self-executing.

As I have stated earlier, it may well be that there are going to be certain questions that are going to be open in terms of the actual transition and implementation of any particular option. However, we prefer that state of the legislation rather than a prolonged debate and possible controversy over contingencies that realistically cannot be well defined or accurately reconciled at this stage of the process.

In conclusion, Mr. Chairman, let me again affirm that the Administration wholeheartedly supports a referendum allowing the people of Puerto Rico to determine what their continuing relationship with the Federal Government shall be. It is the hope of the Administration that the difficulties outlined above can be easily and expeditiously resolved.

As drafted, S.712 provides a first step in this direction, and we believe that it can be revised so as to structure a fair and workable referendum within the applicable constitutional parameters.

The Administration is committed to working with the Committee and the Congress to create a referendum vehicle that will enable the people of Puerto Rico to determine in a meaningful way whether and how to alter their island's existing political relationship with the United States.

I would be happy to address any questions that the Chairman and the Committee might have.

[The prepared statement of Mr. Dennis follows:]

Department of Justice

STATEMENT

OF

EDWARD S. G. DENNIS
ACTING DEPUTY ATTORNEY GENERAL

BEFORE

COMMITTEE ON ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE
WASHINGTON, D.C.

CONCERNING

S. 712
A BILL TO PROVIDE FOR A REFERENDUM ON THE POLITICAL STATUS
OF PUERTO RICO

ON

JULY 11, 1989

Mr. Chairman and Members of the Committee:

It is a pleasure to be here today on behalf of the Administration to discuss S. 712, a bill "To Provide for a Referendum on the Political Status of Puerto Rico." This bill would provide for an island-wide referendum, to be held in 1991, on Puerto Rico's political status. If this bill were to become law, the referendum would present the voters of Puerto Rico with three options: (1) statehood; (2) independence; and (3) "enhanced commonwealth," each separately defined in the bill.

The Administration strongly supports the right of the people of Puerto Rico to choose their political status by means of a referendum. Further, as the President has noted a number of times, he favors the admission of Puerto Rico to the Union as a state, thereby assuring the people of Puerto Rico an equal standing with other United States citizens. However, while the referendum can present options that, if selected by a majority of the voters in Puerto Rico, can immediately be implemented; it is essential that clear choices be offered to the Puerto Rican people. Further, these choices must represent realistic, workable, and economically viable options. As presently drafted, many of the provisions of S. 712 are essentially extraneous to the ultimate goal of giving the Puerto Rican people such a choice

-- a goal that should not be obscured by confusing and unnecessarily detailed provisions.

I would like to highlight some of the provisions that would require revision before this important process goes forward. Please note that this discussion includes what we believe to be the most significant legal, constitutional and policy issues presented by the bill, and is not intended to be exhaustive. Further, as you know, the Departments of Treasury, State, Defense, Agriculture, Health and Human Services, Transportation, and the U.S. Trade Representative, will also be appearing before the Committee to address particular concerns they have with the legislation. Let me assure you, on behalf of the entire Administration, that we are eager to work with the Committee to establish clearly defined status options that can be presented to the Puerto Rican people.

A. TITLE II: STATEHOOD.

Title II of S. 712 defines a "statehood" choice for Puerto Rico. This option is the least problematic from a legal and constitutional standpoint. We do have several comments on the bill as drafted, but on the whole Title II currently represents a realistic status option.

1. Exploitation of the Continental Shelf.

Under Title II, as currently drafted, the new state would be granted the "exclusive right to explore, exploit, lease, possess and use all seabed, natural, and mineral resources lying within the two hundred mile economic zone continental shelf boundary around the waters of the Archipelago of Puerto Rico." (§ 5(b)). No state enjoys such wide authority over its coastal areas. The use and development of the United States coast and continental shelf is governed by the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1315, and by the Outer Continental Shelf Lands Act of 1953, 43 U.S.C. § 1331. Under these statutes, the states generally are entitled to utilize submerged lands within a three-mile boundary, while the Federal Government retains jurisdiction over the balance of the continental shelf. 1/ The legislation admitting both Alaska and Hawaii to the Union specifically required that they be covered by this statutory scheme. 2/ The Administration believes that the same provisions should be included in any act admitting Puerto Rico to the Union.

1/ By Proclamation No. 5928 (Dec. 27, 1988), the United States extended its territorial sea from three miles to a width of twelve miles. It was provided, however, that this extension would not "extend or otherwise alter existing Federal or State law or any jurisdiction, rights, legal interest or obligation derived therefrom."

2/ See Hawaii Statehood Act, Pub. L. 86-3, Mar. 18, 1959, 73 Stat. 4, § 5(i) [hereinafter Hawaii Statehood Act]; Alaska Statehood Act, Pub. L. 85-508, July 7, 1958, 72 Stat. 339, § 6(m) [hereinafter Alaska Statehood Act].

2. Economic Adjustments.

The Administration recognizes and supports the realistic need to have an economically viable transition from commonwealth to statehood. A realistic transition is in the interest of the federal government, as well as Puerto Rico. Such transition provisions have been adopted in previous statehood bills. For example, when Alaska was admitted to the Union, the federal government made very significant land grants to the new state to help establish it on a sound fiscal footing. The Administration believes that a transition to statehood should result in no net revenue loss to Puerto Rico. The Administration would support a transition grant to Puerto Rico. The budgetary treatment of a transition to statehood should be consistent with sound budget discipline.

3. Attainment of Equal Social and Economic Status.

Title II also would require Congress to pass an "omnibus act" "to ensure that the people of Puerto Rico attain equal social and economic opportunities with the residents of the several States." (§ 16(c)). This provision is very problematic as the bill does not define "equal social and economic opportunities." Federal law, not to mention the Constitution, guarantees that individuals will not be discriminated against on account of race, religion, sex, age, or national origin. It does not, however, guarantee equal social and economic rights or opportunities in a broader sense. It is impossible to foresee all of the implications of such a vague provision. But it is doubtful whether Congress truly could "ensure" that the people of Puerto Rico -- or any other group -- enjoy equal "social and economic opportunities," presumably in all spheres of life. The Constitution and laws can guarantee equality under the law, and forbid invidious discrimination. We doubt whether any legal code effectively could ensure equal social and economic opportunities.

B. TITLE III: INDEPENDENCE.

Title III of S. 712 details the independence option to be offered to the Puerto Rican people. As currently drafted, the provisions of Title III do not represent a total "independence" option. While the administration fully supports the right of the Puerto Rican people to chose independence, the serious constitutional and policy problems of Title III must be addressed. We discuss the most significant of these.

1. Unconstitutional Voter Qualifications.

Title III, § 2.1(b), strictly limits those entitled to vote for delegates to the convention responsible for drafting a constitution for an independent Puerto Rico. The franchise for this election would be restricted to residents born in Puerto

Rico, residents who have at least one parent born in Puerto Rico, 20 year residents, residents who established their residence before attaining voting age, and the spouses of voters who meet these qualifications.

At present, Puerto Rico is under the sovereignty of the United States, and is bound by the Equal Protection Element of the Due Process Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment. See Rodriguez v. Popular Democratic Party, 457 U.S. 1 (1982). Voting qualifications based upon place of birth, parentage, or an excessively long residence requirement clearly violate those Equal Protection guarantees. This is so even if the limitations are imposed in an election in preparation of future independence.

2. Citizenship.

Under the independence provisions of S. 712, Puerto Rican residents would be entitled to maintain a dual citizenship, in both the United States and the new Republic of Puerto Rico ("RPR"). Allowing Puerto Rican residents to retain United States citizenship while becoming citizens of the new republic obscures the reality of independence for the Puerto Rican voter more than any other provision. Allowing such dual citizenship, while not unconstitutional, is fundamentally inconsistent with granting full independence to the Island.[3]

Moreover, under accepted principles of international law a transfer of sovereignty of a territory transfers the allegiance of those who remain in the territory from the former sovereign to the new sovereign.[4] We believe that it is well within the authority of the Congress to require the residents of Puerto Rico at the time of independence, and who continue to reside there, to choose between their United States citizenship, and citizenship in the newly independent Puerto Rican Republic.

Requiring such a choice would be consistent with the Supreme Court's jurisprudence with respect to United States citizenship under the 14th Amendment. Citizenship acquired pursuant to the 14th Amendment, by birth or naturalization in the United States, is constitutionally protected. The Supreme Court has held, however, that Congress has authority to condition citizenship acquired outside of the territorial boundaries of the United States -- i.e., outside of the States, the District of Columbia, or a territory that actually has been "incorporated" into the United States. See Rogers v. Bellei, 401 U.S. 815 (1971).

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[3] "Dual" citizenship is allowed on an individual basis. But this is quite different from allowing virtually the entire population of Puerto Rico to maintain American citizenship while nevertheless residing on foreign soil.

Indeed, when the Philippine Islands were granted their independence in 1946, both the residents of the new nation and Philippine citizens living in the United States lost their status as United States "nationals." It is true that the people of the Philippines never enjoyed full United States citizenship, but were only United States "nationals." While "nationality" is a lesser status than "citizenship," the principle remains the same; to effectively grant independence to Puerto Rico, her residents must chose between allegiance to the United States or allegiance to the new nation.

[4] See American Insurance Company v. Canter 26 U.S. (1 Pet.) 511, 542 (1828); United States ex rel. Schwarzkopf v. Uhl, 137 F.2d 898, 902 (2d Cir. 1943) and the authorities there cited; O'Connell, The Law of State Succession 246 (1956).

Puerto Rico was not "incorporated" within the United States upon its acquisition from Spain, see Downes v. Bidwell, 182 U.S. 244 (1900), and Congress has never purported to effect such an incorporation. As a result, the citizenship of Puerto Rican residents is statutorily protected by the Jones Act, 39 Stat. 953, 8 U.S.C. § 1402 (1917), rather than by the 14th Amendment. Such citizenship is subject to reasonable statutory regulations. Consequently, it would be within Congress' authority to require Puerto Rican residents to choose between their United States citizenship and citizenship in the new republic.

3. Treaty of Friendship and Cooperation.

Title III of S. 712 also contains a number of provisions dealing with the relationship between the United

States and the RPR after independence. 5/ Section 6.1 would require that all of the provisions of the bill scheduled to take effect after the proclamation of independence be embodied in a treaty of friendship and cooperation between the RPR and the United States.

This provision is troublesome insofar as it attempts to define in detail the policy of the United States towards Puerto Rico after independence. The Constitution vests the authority to formulate and implement the foreign policy of the United States primarily in the President. Treaties are made by the President with the advice and consent of the Senate. We believe that such a detailed statutory scheme governing the future relationship of the United States and an independent Puerto Rico would violate the principle of separation of powers. For example, under the Constitution the President cannot be required to negotiate, and the Senate cannot be required to consent to, particular treaty provisions required in advance by statute.

5/ For example, the United States would be required to: "collaborate with" the RPR "toward the ultimate goal of disarmament, peace, and international relations based on the principles of equality, mutual respect and interdependence"; give the RPR particularly favorable trade treatment for a period of twenty years; maintain for twenty-five years a full income tax exemption on interest payments to holders of Puerto Rican bonds; aid Puerto Rico in the establishment of a deposit insurance system; and continue guarantees currently provided to investors in the secondary loan market.

Further, in addition to attempting to define United States policy toward a newly independent Puerto Rico, the bill attempts to define in detail the policy of the RPR towards the United States. The act must provide for a smooth transition to independence, if that is the result of the referendum. But it is imperative that both nations remain free to define their future relationships.

C. TITLE IV: COMMONWEALTH.

1. Enhanced Commonwealth Status.

Under Title IV of S. 712 Puerto Rico's present commonwealth status would be "enhanced" by a number of provisions. For example, in many instances federal legislation would be inapplicable to the Island, the President's right to appoint federal officials in Puerto Rico would be restricted to a list provided by the Puerto Rican Governor, Puerto Rico would be authorized to negotiate its own air transportation treaties, the functions of the National Labor Relations Board in Puerto Rico would be taken over by a Puerto Rican Labor Relations Board, special protection would be provided for Puerto Rican copyrights, and the Governor of Puerto Rico would be empowered to issue United States passports. This list is not exhaustive, but it does reflect issues that are of concern to the Administration.

In many respects, the "enhanced" Commonwealth option would render the Island virtually independent of United States authority in many areas. It also would grant Puerto Rico much greater advantages than any other area under United States sovereignty that is not a State. So long as Puerto Rico remains under the sovereignty of the United States, it is essential that this fact be made clear beyond peradventure. Any statements that the Island is "autonomous" in the bill must make clear that this "autonomy" is limited to internal affairs, and that as a commonwealth Puerto Rico remains under the sovereignty of the United States. Congress retains the authority to legislate with respect to Puerto Rico, and federal law may not be preempted or nullified by the local government.

2. Federal Statutes and Regulations.

Subpart 4 of Title IV discusses the applicability of federal laws to Puerto Rico. Under current law, federal statutes "not locally inapplicable" within the meaning of section 734 of the Puerto Rico Federal Relations Act, 6/ have the same force and effect in Puerto Rico as in the United States. Under Title IV, however, any federal statute would be inapplicable to Puerto Rico unless it is consistent with a policy of allowing Puerto Rico: greater autonomy; "more equitable" participation in federal programs; greater participation in federal government decisions

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6/ 48 U.S.C. § 734.

affecting the Island; provides safeguards for Puerto Rico's "distinct cultural identity; and "has proper regard for the economic, cultural, ecological, geographic, demographic and other local conditions of the Commonwealth of Puerto Rico." [7] Under this provision, the great bulk of federal legislation would become "locally inapplicable" to Puerto Rico. Only if Congress makes a certification of an overriding national interest would a particular federal law apply to Puerto Rico. Similar provisions would apply to federal rules and regulations.

Further, under Subpart 4, the Governor of Puerto Rico would be granted an unprecedented and truly extraordinary power to certify that a federal law or a federal regulation is inapplicable to Puerto Rico. The subsection would thereby confer on the Governor a significant authority pursuant to the laws of the United States. Such authority, however, may be vested only in an officer of the United States. [8] The Governor of Puerto Rico is elected by the people of Puerto Rico. He is not an officer of the United States. The power envisaged by subsections (c) and (f) of Subpart 4 therefore cannot constitutionally be vested in him.

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[7] The bill provides four exceptions to this rule: laws relating to citizenship; laws providing grants or services for individuals; uniform laws involving defense or national security, and laws for which Congress makes a specific finding that there is an overriding national interest in the law's application to Puerto Rico.

[8] I.e., a person appointed pursuant to the Appointments Clause of the Constitution (Art. II, section 2, cl. 2). Such an officer must be appointed by the President by and with the advice and consent of the Senate or, where authorized by Congress, by the President alone, the courts of law, or the heads of departments. Buckley v. Valeo, 424 U.S. 1, 118-41 (1976).

3. Federal Appointments and Representation.

Subpart 13 of Title IV would provide that the highest ranking federal officials in Puerto Rico must be appointed by the President from a list of eligible candidates recommended by the Governor of Puerto Rico. A requirement that the President make appointments only from a list of candidates submitted to him is objectionable as a matter of constitutional law.

As noted above, the Appointments Clause of the Constitution (Art. II, section 2, cl. 2) requires that "officers of the United States" -- i.e., those persons who exercise "significant authority pursuant to the laws of the United States," Buckley v. Valeo, 424 U.S. 1, 126 (1976) -- be appointed by the President subject to the advice and consent of the Senate. "Inferior" officers may be appointed by the President alone where the Congress has vested this authority in him, or in the heads of the executive branch departments. The President's authority to nominate principal officers cannot be qualified by law.

Subsection 13 purports to permit the Governor of Puerto Rico to share in the President's appointment power, and to accord the Governor significant authority under the laws of the United States. Accordingly, we believe that the requirement that the President nominate officials from a list submitted by the Governor of Puerto Rico is unconstitutional and should be deleted.

4. Special Treatment Regarding Labor Relations Laws.

Under Title IV, Subpart 12, the National Labor Relations Board would no longer handle cases arising in Puerto Rico under the National Labor Relations Act; the NLRB's authority in such cases would be delegated to the Puerto Rican Labor Relations Board. Thus, the Puerto Rican Labor Relations Board would exercise significant authority pursuant to the laws of the United States, and perform a significant governmental duty pursuant to federal law. As mentioned above, such authority may only be delegated to, and exercised by, persons appointed pursuant to the Appointments Clause. Thus, in our view, this delegation would be subject to a serious constitutional infirmity.

5. Special Treatment Regarding Passports.

Additionally, under Title IV, Subpart 16(a), the Governor of Puerto Rico would be entitled to issue United States passports, and Subpart 16(b) would entitled the Governor to administer a United States passport office. We object to this entire subpart. The issuance of a passport constitutes the performance of a significant authority pursuant to the laws of the United States. As indicated above, such authority cannot be vested in the Governor of Puerto Rico.

Moreover, these functions have been strictly relegated to the Department of State. The United States under no circumstances should cede its power to determine nationality by the issuance of U.S. passports, nor should it cede regulation and control of its borders to any other authority. Apart from obvious constitutional concerns stemming from the same separation-of-powers arguments detailed earlier, and foreign policy concerns, there are sound practical reasons for opposing these provisions. Chief among these is law enforcement. Control over the issuance of U.S. passports and immigration must remain wholly within a federal authority if matters such as extradition and narcotics are to approached and dealt with in a coordinated and effective fashion.

6. Special Treatment Regarding Federal Functions.

Finally, Subpart 20 would authorize the Government of the United States, or any agency thereof, to delegate to the Commonwealth of Puerto Rico the total or partial performance of functions vested in the United States. These functions would include the administration of such federal laws and programs on the Island, as may be mutually agreed. As explained above, the enforcement of federal laws cannot be vested in, or delegated to, persons not appointed in conformity with the Appointments Clause of the Constitution. To this extent, Subpart 20 would be unconstitutional.

CONCLUSION:

In conclusion, Mr. Chairman, let me again affirm that the Administration wholeheartedly supports a referendum allowing the people of Puerto Rico to determine what their continuing relationship with the federal government shall be. It is the hope of the Administration that the difficulties outlined above can be easily and expeditiously resolved. As drafted, S. 712 provides a first step in this direction, and we believe that it can be revised so as to structure a fair and workable referendum within the applicable constitutional parameters.

The Administration is committed to working with the Committee and the Congress to create a referendum vehicle that will enable the people of Puerto Rico to determine in a meaningful way whether, and how, to alter their Island's existing political relationship with the United States. I would be happy to address any questions the Committee may have.

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 24, 1989

Honorable J. Bennett Johnston
Chairman
Committee on Energy and Natural
Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter contains the preliminary views of the Department of Justice on the Johnston/McClure Amendment in the nature of a substitute to S. 712. In general, this bill contains far fewer substantive problems than S. 712 as originally drafted. Outlined below are some of the concerns the Department still has with the bill.

TITLE I - PROCESS OF REFERENDUM

1. Federal Monitoring.

We object to the requirement in Title I, section 101(d) that the Attorney General shall provide for adequate monitoring of the referendum by United States Marshals. Elections, including a status referendum such as a referendum on the question of statehood, are ordinarily conducted locally, overseen by local officials. Only in very extraordinary circumstances, for example, where there is a history of racial discrimination by actual exclusion from the polling places, has the Department become involved in monitoring elections. We are aware of no evidence that there is a history of such exclusion in Puerto Rico, and therefore would oppose the use of such extraordinary measures.

2. Three Judge Court.

Title I, section 101, would establish a three judge court to resolve disputes arising out of the referendum. We do not oppose this mechanism as a means of dispute resolution, but suggest that it be made clear that this is to be an extraordinary court of limited jurisdiction. In this regard, we believe that section 101(e)(2) should be amended to read "Any claim regarding this Act brought under the U.S. Constitution or a federal statute . . ."

3. Referendum Information Officer.

The Department does not oppose the appointment of a referendum information officer as provided in section 101(g) of the Johnston/McClure substitute. However, we strongly object to the provisions regarding the referendum information officer's appointment. Pursuant to Sec. 101(g) the President would be required to appoint the information officer from a list provided by the three principal political parties in Puerto Rico. The Referendum Information Officer would be responsible for translation and distribution of information and educational materials on the status referendum that would purport to represent the position of the United States. Thus, we believe he may well exercise a significant federal authority. It is well established that such authority may be vested only in an officer of the United States, appointed pursuant to the requirements of the Appointments Clause of the Constitution. Buckley v. Valeo, 424 U.S. 1, 126-141 (1976). We object to a requirement that the information officer be appointed from a list, because the creators of the list would then share in the President's power of appointment.

TITLE II - STATEHOOD

1. Puerto Rico's Territorial Waters.

Title II, section 203, defines the new state as consisting of the territory, together with the territorial waters of the Commonwealth of Puerto Rico. We believe that this formulation is ambiguous and may give rise to claims that Puerto Rico is entitled to the 12-mile wide territorial sea of the United States. The ambiguity is caused in part by the circumstance that while the United States has a territorial sea, the states and territories have a seaward boundary. The breadth of the present seaward boundary of Puerto Rico is three maritime leagues or nine nautical miles. 48 U.S.C. § 749. We assume that, pursuant to the last sentence of 43 U.S.C. § 1312, Puerto Rico will retain that seaward boundary if it becomes a State. We recommend, therefore, that section 203 be redrafted as follows:

> The State shall consist of all the territory together with the waters included in the seaward boundary of the Commonwealth of Puerto Rico.

The Department of Commerce concurs in this suggestion.

III. - INDEPENDENCE

1. Electorate for the Puerto Rican Constitutional Convention.

Title III, section 301(b) of the bill would restrict the electorate for delegates to the Puerto Rican constitutional convention to residents born in Puerto Rico, residents who have at least one parent born in Puerto Rico, 20 year residents, residents who established their residence before attaining voting age, and the spouses of voters who meet these qualifications.

We believe that these limitations are unconstitutional. As long as Puerto Rico is under the sovereignty of the United States it is bound by the Equal Protection Element of the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment. Rodriguez v. Popular Democratic Party, 457 U.S. 1, 7-8 (1982). Voting qualifications based on place of birth, parentage, or an excessively long residence requirement would violate the Equal Protection requirements. The fact that the election is to take place after Puerto Rico has opted for independence does not change this analysis. So long as the election takes place before Puerto Rico is actually declared an independent, sovereign nation the Constitution will apply.

2. Dispute Resolution after Certification of the Referendum.

We object to Title III, section 306, which would stay actions arising under this title filed after the election is certified, and refer any such disputes to the Joint Transition Commission for resolution. Given that the United States still retains sovereignty over Puerto Rico and its residents up to the proclamation of independence, resolution of disputes leading up to independence must remain in the federal courts.

3. Joint Transition Commission.

As soon as the referendum is concluded, and assuming independence is certified as the result, a Joint Commission must be appointed in equal numbers by the President and by the presiding officer of the Constitutional Convention of Puerto Rico. The Commission would have responsibility for "expediting the orderly transfer of all functions currently exercised by the Government of the United States," to an independent Puerto Rico, "including the recommendation of appropriate legislation to the appropriate officials of each government." Further, the Commission would be required to establish several "task forces" which would be responsible for negotiating various agreements between the United States and Puerto Rico.

Title III contains a number of provisions requiring that agreements be negotiated before Puerto Rico is declared independent. For example, section 312 provides for the negotiation of certain defense agreements, sections 313, 314, and 315 provide for the negotiation of agreements relating to the continuation of various federal programs, the Social Security System and Medicare in Puerto Rico after independence, and section 318 provides for the negotiation of an agreement relating to the establishment of a Puerto Rican deposit insurance system.

We do not oppose the Commission in principle. On the other hand, several points with respect to the Commission, and particularly with respect to the proposed agreements, must be clarified to avoid constitutional problems. First, it must be made clear that the task forces, which will be responsible for negotiating the several proposed agreements under the bill, are to be appointed in the same manner as the Commission itself, e.g., half by the President and half by the Presiding Officer of the Constitutional Convention of Puerto Rico. Second, it must be made clear that only those members duly appointed by the President may represent the United States in the negotiation of agreements with Puerto Rico. Third, each provision of the bill which provides for the negotiation of an agreement must contain the language that appears in Title III, section 312(1) (regarding defense agreements): "and approved in accordance with the constitutional processes of the United States." Finally, Title III, section 307(a) must be amended to make clear that the proclamation of independence is dependent upon the approval, according to constitutional means, of any such agreements.

We believe that such agreements can be negotiated before Puerto Rico is declared independent, following the precedent of the Compact with the Freely Associated States and the legislation approving them, Public Law 99-239. The ability of an inchoate government to bind the government for the period after it gains full independence was recognized in connection with the evolution of the Freely Associated States (Federated States of Micronesia and the Republic of the Marshall Islands). See, Juda v. United States, 13 Cl. Ct. 667 (Cl. Ct. 1987, aff'd sub. nom. People of Enewetak v. United States, 864, F.2d, 134 Fed. Cir. 1988). Antolok v. United States, 873 F.2d, 369 (D.C. Cir. 1989). We believe that the ability of the United States to enter into such agreements would be even stronger than in the case of the Freely Associated States, if Congress delegated to the President its authority under Article IV, sec. 3, cl. 2 of the Constitution. In that event the President's power to conclude those agreements would flow not only from his foreign relations power but also from the territorial authority of Congress.

4. Judicial Pronouncements.

Under Title III, section 309, the judicial authority of the United States would be withdrawn from Puerto Rico immediately upon independence, and pending cases would be transferred to the corresponding Puerto Rican courts. If Puerto Rico is to be independent, at some point the jurisdiction of the United States, including judicial power, over the Island must end. Further, the exact form of the transition, however, is principally a matter for negotiation between the United States and the new government, although the United States would certainly be able to impose certain requirements as a condition of independence. In order to effectuate a smooth transition to independence, we recommend that a transition period be established during which United States jurisdiction would continue and be wound up in a smooth and orderly fashion.

A recent precedent for the termination of United States judicial power over territory to be included in a foreign state is the Panama Canal Zone. Pursuant to Article XI of the Panama Canal Treaty, during a transition period of thirty months from the date the Treaty entered into force, the civil and criminal laws of the United States were to apply concurrently with those of the Republic of Panama in certain areas of the old Canal Zone. The United States retained the right to exercise jurisdiction in criminal cases relating to offenses under the laws applicable to the Canal Zone, committed prior to the treaty's entry into force.[1] The courts of the United States were allowed to continue functioning during the transition period "for the judicial enforcement of the jurisdiction to be exercised by the United States of American in accordance with this Article." The courts of the United States were to have no jurisdiction over new private civil cases, but were allowed to retain jurisdiction during the transition period "to dispose of any civil cases, including admiralty cases, already instituted and pending before the courts prior to the entry into force of this Treaty." Additionally, the laws, regulations, and administrative authority of the United States, not inconsistent with the treaty, were to continue in force "for the purpose of the exercise of the Unites States of America of law enforcement and judicial jurisdiction only during the transition period. The parties agreed to further consultations with respect to the "disposition of cases pending at the end of the transition period." Finally, during the transition the United States retained the right to incarcerate individuals in certain facilities in Panama, or to transfer them to penal facilities in the United States to serve their sentences.

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[1] See Article XI, Panama Canal Treaty.

5. Citizenship.

Under Title III, section 311, Puerto Ricans born before the certification of the referendum would be allowed to retain their American citizenship, as well as obtain citizenship in the new republic. While Congress has the power to allow such an arrangement, we strongly oppose allowing dual citizenship for the entire Puerto Rican population. As stated in the Administration's testimony, we believe that each status option must be both clear and realistic. Independence for Puerto Rico must mean real independence, which must include an eventual loss of American citizenship for residents of Puerto Rico. Under a venerable rule of international law, a transfer of sovereignty of a territory transfers the allegiance of those who remain in the territory from the former sovereign to the new sovereign. American Insurance Company v. Canter, 1 Pet. (26 U.S.) 511, 542 (1828); United States ex rel. Schwarzkopf v. Uhl, 137 F.2d 898, 902 (2d Cir. 1943) and the authorities there cited; O'Connell, The Law of State Succession 246 (1956). 2/

We recognize, of course, that the well established international rule that a change in sovereignty works a change in citizenship must still be tested against the municipal law of the United States, especially the first sentence of the Fourteenth Amendment to the Constitution which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State in which they reside (emphasis added).

We doubt, however, that as an original matter the first sentence of the Fourteenth Amendment was intended to protect citizenship which is lost by virtue of a rule of international law recognized at the time of the Amendment's adoption.

In any event we believe that requiring citizens of a newly independent Puerto Rico to choose between remaining there as citizens of Puerto Rico and returning to the United States to

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2/ Within the framework of this general rule specific treaties affecting the transfer of territory do frequently permit that the transfer of nationality ought to take place only with the consent, express or implied of the persons affected. Hence, such agreements frequently give the inhabitants of the territory an option under which they can retain their former nationality, but usually at the "heavy" price of leaving the territory. Those who remain behind as a rule acquire the new nationality and lose their original one. Whiteman, Digest of International Law, Vol. 2 pp. 934-935 (1963).

retain U.S. citizenship is wholly consistent with the Supreme Court's jurisprudence on this clause of the Fourteenth Amendment. In this, the Department squarely disagrees with the analysis of Professor Tribe.

The Supreme Court has held that Congress has authority to impose certain requirements upon those who acquire citizenship outside the United States. In Rogers v. Bellei, 401 U.S. 815 (1971), the Court was confronted with a case involving a person, born abroad, who had acquired United States citizenship pursuant to 8 U.S.C. § 1481 because his mother was a citizen of the United States. Bellei, however had failed to comply with section 1401's residency requirement. [3] The Department of State determined accordingly that he had lost his United States citizenship. The Court concluded that because Bellei had acquired citizenship abroad he was not a citizen by operation of the Fourteenth Amendment but only by operation of a statute that contained a condition subsequent, namely the requirement that he take up residence in the United States. Hence, notwithstanding the Fourteenth Amendment, the Court held that Bellei lost his citizenship by failing to comply with that condition. [4]

Under Bellei the issue thus appears to be whether the United States citizenship of persons born in Puerto Rico flows from the Fourteenth Amendment or from statute. Puerto Rico was not "incorporated" within the United States upon its acquisition from Spain, see Downes v. Bidwell, 182 U.S. 244 (1900), and Congress has never purported to effect such an incorporation. As a result, the citizenship of Puerto Rican residents is based on the Jones Act of March 2, 1917, which conferred United States citizenship on persons born in Puerto Rico. 8 U.S.C. § 1402

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[3] This section provided, with respect to certain individuals born abroad, that a citizen would lose his citizenship unless, before the age of 23, he came to the United States and resided here continuously for at least 5 years. This five year period had to take place between the ages of 14 and 28.

[4] We recognize that in Afroyim v. Rusk, 387 U.S. 253, 260 (1967), the Supreme Court held that a citizen of the United States has "a constitutional right to remain a citizen of a free country unless he voluntarily relinquishes that citizenship." The Bellei court, however, held that the statement in Afroyim that United States citizenship cannot be lost unless voluntarily relinquished, was limited to citizenship acquired pursuant to the Fourteenth Amendment i.e., by birth or naturalization in the United States, and therefore did not apply to Bellei who had acquired his United States citizenship by birth to a U.S. citizen outside the United States.

(1917), rather than on the 14th Amendment. Indeed, the very fact that it required a statute to confer United States citizenship on the residents of Puerto Rico indicates that they were not considered citizens of the United States by virtue of the Fourteenth Amendment, for if they were, the Jones Act would not have been necessary.

It follows that, under the Bellei analysis, persons born in Puerto Rico are not born in the United States. Their citizenship therefore has a statutory, rather than a constitutional, basis, and consequently is subject to reasonable statutory regulations, especially one which is in accord with a generally recognized rule of international law. Hence, it would appear reasonable to assume that provisions to the effect that citizens of the United States who continue to reside in Puerto Rico after independence lose their United States citizenship, or would have to opt for one or the other citizenship, would pass constitutional muster.

TITLE IV - COMMONWEALTH

1. Presidential Consultation Regarding Trade Agreements.

Title IV, section 406(b), would amend section 1102 of the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. 2902, to require the President to seek the advice of the Commonwealth of Puerto Rico during the process of negotiating certain trade agreements affecting Puerto Rico, and to consult with the Governor of the Commonwealth of Puerto Rico concerning the potential impact on Puerto Rico's economy of any proposed tariff rate change. We object to the requirement that the President must seek the advice of Puerto Rico during ongoing negotiations.

As noted above, the Constitution vests the authority to formulate and implement the foreign policy of the United States in the President. See United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). In particular, the power to make treaties is vested in the President, with the advice and consent of the Senate. A requirement that the President seek the advice of Puerto Rico during negotiations, presumably with respect to specific treaty provisions under consideration, improperly intrudes upon his constitutional prerogatives.

Further, we object on policy grounds to the requirement that the President "consult" with the Governor of Puerto Rico with respect to the impact of tariff rate changes on Puerto Rico. While we are sure that the President would, in any case, carefully consider the interests of Puerto Rico before concluding any such agreement, we do not think it wise to attempt to require him to consult with Puerto Rico's governor.

2. Appointments of Federal Officials.

Title IV, section 408, would require the President, and the heads of departments or agencies making federal appointments, to consult with the Governor of Puerto Rico, or other appropriate Puerto Rican official, "as to whether there are special circumstances or qualifications which should be considered in making the appointment." We object to a requirement that the President "consult" with Puerto Rican officials before making appointments.

The President's appointment power under Article II, section 2, clause 2, is limited only by the requirement of Senate advice and consent, for principal officers. The appointment of inferior executive officers may be vested in the President alone, or the heads of executive departments who are directly answerable to the President. The Appointments Clause admits of no statutory restrictions on the President's discretion in exercising the appointment power, and no statutory restrictions or directions concerning persons with whom the President may, or must, consult. Washington Legal Foundation v. United States Department of Justice, 691 F.Supp. 483 (D.D.C. 1988) (unconstitutional for Congress to restrict President's appointment power under Art. II, § 2, cl. 2), aff'd on statutory grounds sub nom. Public Citizen v. United States Department of Justice, slip op. No. 88-429 (U.S., June 21, 1989) at 25 (noting that application of Federal Advisory Committee Act (FACA) to Justice Department's consultation with American Bar Association concerning possible appointments of the President to the federal courts "would present formidable constitutional difficulties"). Accord id. (Kennedy, J., concurring in the judgment), slip op. at 16-22 (FACA unconstitutionally interferes with President's exclusive power of nomination under Appointments Clause).

We would have no objection, however, to a requirement that the Governor of Puerto Rico provide to the President, or to the responsible department or agency head, advice and information with respect to any "special circumstances or qualifications which should be considered in making" certain federal appointments in Puerto Rico.

3. Community Values.

Under Title IV, section 411, an exception to the antitrust laws would be made for discussions or agreements among persons in the entertainment industry for the purpose of developing "voluntary guidelines designed to alleviate the negative impact of violence, pornography, alcohol and drugs in all audio or visual entertainment in Puerto Rico." This exception would be activated by a declaration by the Governor of Puerto Rico. This exception is very similar to a more general exception to the antitrust laws now under consideration in the

Congress, S. 593 and H.R. 1391, limited to violence. As with those bills, the Department of Justice has no substantive legal objection to the proposed exception.

The Department does, however, object to section 411(c)(2). This section would limit the applicability of the antitrust exception to 36 months after the bill is enacted, and would allow it to be extended for another 36 months upon "declaration by the Governor of Puerto Rico." This would allow the Governor of Puerto Rico to exercise significant federal authority. As explained above, only officials appointed pursuant to the requirements of the Appointment's Clause may exercise such authority. The Governor of Puerto Rico is not appointed in this manner, and, therefore, may not exercise this authority consistent with the Constitution.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

John P Mackey

John P. Mackey
Deputy Assistant Attorney
General

cc: Honorable James A. McClure
Ranking Member
Senate Committee on Energy
and Natural Resources
United States Senate

The **Chairman**. Thank you very much. First of all, with respect to the general philosophy with which the administration approaches this bill, first of all, let me say on my own behalf, and I believe—I never speak for Senator McClure. He has spoken for himself, and the two of us are together on the idea of putting together a proposal that has three choices in letting the people of Puerto Rico decide, feeling that those choices should be credible and real and that we have not expressed our opinion and try not to have one as to which of the choices is proper for the people of Puerto Rico to make. Let them make the choice, but our job being to put together a realistic choice.

Now, the President in his State of the Union Address endorsed statehood. Nevertheless, as I understand from what I hear from the White House, particularly Andy Card, who is heading up this for the administration, that they also, while they do favor statehood, are wedded to the idea of putting together three realistic choices and not trying to skew the results. Am I correct on that?

Mr. **Dennis**. Absolutely. There should certainly be as free a disclosure to the people of Puerto Rico as to what these options represent and that the choices be clear and as unambiguous as possible and that they not be weighted in any way. That would be unfair or would skew the process insofar as actually having the referendum represent the true will of the people of Puerto Rico.

So that although, obviously, we expect there will be a healthy debate over these choices and many of us in this room would have our own opinions as to which choice we favor, it is our responsibility to make sure that through this legislation a process is sculpted which creates a procedure and an environment in which that referendum will be as meaningful as possible in determining this issue and also that it would be in a form that would allow for the greatest degree of self-execution after the results of the referendum have been determined.

The **Chairman**. I am pleased to hear you say that. You think that will be generally reflected throughout the administration?

Mr. **Dennis**. Yes, I believe so.

The **Chairman**. So, while the President may be for statehood, in helping us design the particular proposals under each of the three choices, there will be no attempt to make statehood look better with respect to the others, that we will be guided by an even-handedness in that.

Mr. **Dennis**. Absolutely.

The **Chairman**. I am very pleased to hear you say that, and I want to repeat on my part that that is what we are going to do. That is what I am going to do, at least.

Now, on the question of general philosophy of this, we have approached it in a general way of having no net revenue loss; that is, you take a status quo as being the baseline, and we want a change of status not to result so far as possible and reasonable, no net revenue loss.

Is the administration also in agreement with that?

Mr. **Dennis**. Yes, that is our approach. Obviously the technical issues related to an economic transition from the commonwealth status to statehood are going to have to be carefully considered, but obviously it is not in our interest to have Puerto Rico disadvantaged economically by this process of moving from commonwealth to statehood.

The basic objective and goal would be to maintain as much as possible the general continuity of the Puerto Rican economy so that it might move smoothly into a new status.

There are certain particular provisions which we have, I think, elaborated on to some extent, but that is generally the approach that we would favor, and I think that is consistent with what the treatment that has been afforded other states that had relatively recently moved from a territorial status into statehood.

The CHAIRMAN. Let me say my own view is that other states coming into the union offer a useful legal precedent but do not give us much of a guide as to what happens to Puerto Rico, because the situation down there is not unusual and unique, and they do not have any oil in Puerto Rico as they did in Alaska. Alaska did not have 936, so we really have to design a transition period with Puerto Rico based on its own merits.

Mr. DENNIS. Absolutely.

The CHAIRMAN. I am pleased to hear you say two things which are, at least my view, that is, that we should both make viable alternatives and have a philosophy of no net loss.

Now, the two may collide in some respects; that is, if there is during the period of transition some problem that can be solved only with a few dollars for a short period of time to get us over a transition, then I think we must do that in any of the status changes here.

But that must be, in my view, a strong case must be made, and it must be as close as possible to no net revenue loss because I can tell you as a member of the budget committee and the appropriations committee there is not any money from which to take to fund that transition.

We would have to borrow it to do so, and I do not think the Congress is in any mood to do so. It is not a lack of generosity on our part. It is a realistic view that we just simply cannot afford to pay out a lot more money.

Now, with respect to carrying out that policy of no net loss with respect to statehood, is there any legal problem in phasing in federal taxes and in phasing out benefits, such as 936 and in phasing in federal benefits such as increased food stamps, grants, etcetera?

Or, to put it another way, does the granting of citizenship under statehood give an automatic, unqualified right to receive identical treatment from stateside citizens which right overrides the statehood power that we have, that the Congress has under the Constitution?

Mr. DENNIS. In general terms, once the status of statehood is achieved, there are certain constitutional limitations insofar as the taxing power is concerned. There is a requirement of general uniformity insofar as the imposition of taxes are concerned.

However, we do believe that there must be a period of transition, and the Congress does have the power to make gradual adjustments towards a fully functioning political entity with a uniform base of taxation that is consistent with those of the other 50 states.

The CHAIRMAN. Let me be specific on taxation. Does the uniformity clause require that on the date of statehood that Puerto Rico will be taxed on the same basis as everyone else?

Mr. DENNIS. No. Transition is permitted.

The CHAIRMAN. Is the transition permitted on the phase-in of benefits?

Mr. DENNIS. I believe so, yes. In fact, in terms of benefits—and I do not want to speak in terms of the specific programs and obviously those departments that administer those programs would be better able to speak to the statutory framework.

The CHAIRMAN. I am talking about constitutional.

Mr. DENNIS. Constitutionally, no, not insofar as benefits are concerned.

The CHAIRMAN. In other words, we have a pretty free hand on a transition period under the statehood power?

Mr. DENNIS. That is correct. You have a freer hand with benefits than you do with taxes, but you do have leeway there.

The CHAIRMAN. We are speaking of benefits to people, now? In other words, a citizen of Puerto Rico on the day after statehood would not have standing to assert the Fourteenth Amendment right of equal protection to say that his food stamp grants were less than he would have received if he lived in Utah.

Mr. DENNIS. That is correct.

The CHAIRMAN. Good. That is what I thought.

Now, with respect to making viable choices, there is this problem of citizenship under independence. Many people feel that to require an election of citizenship under independence may be taking too strong a posture toward independence and sort of skewing the process by doing so, so I am grappling with a view of not requiring a termination or an election of citizenship.

I understand that a dual citizenship is permitted in some circumstances under the present law, is that correct?

Mr. DENNIS. It is constitutionally permitted, yes.

The CHAIRMAN. In other words, you acquire citizenship under the present law. How do you lose it?

Mr. DENNIS. Under the present law, if your citizenship is grounded in the Fourteenth Amendment, that citizenship cannot be taken from you, and that would arise, of course, if you are born in the United States in a state of the United States, and there are some other provisions as well in terms of the Fourteenth Amendment citizenship.

The CHAIRMAN. You can take that away on treason?

Mr. DENNIS. Yes.

The CHAIRMAN. And you can renounce your citizenship.

Mr. DENNIS. Yes, but it is very limited. You have got the strongest legal guarantees of that.

The CHAIRMAN. Let us take a statutory citizenship that you can have a dual citizenship under what circumstances?

Mr. DENNIS. Well, the Congress can grant a status of dual citizenship. That is within its power. And in this situation, that could be granted legally or constitutionally.

The CHAIRMAN. I am talking about precedent. For example, I understand you can be an American citizen, and you can go to Israel and vote in their elections?

Mr. DENNIS. Yes.

The CHAIRMAN. Is there a special statutory provision with respect to Israel, because that is frequently discussed?

Mr. DENNIS. I really do not know on that. I am not aware of the statutory framework for those who hold dual citizenship in Israel and the United States. But I do know that status is within the power of Congress to permit, and it could be permitted in this instance.

Our position is, however, as a matter of, again, presenting a clear choice to those that are voting that the independence choice is inconsistent with the notion that those who would be in Puerto Rico as a new republic would be permitted to maintain both citizenship in the United States and in the new republic.

The CHAIRMAN. I understand that is your position, and frankly that was my position, which I mentioned here on the first day. But I want to fashion some choices here that will be real choices, and I do not want to skew the process.

And as I say, independence people say, well, you take away that citizenship unnecessarily, it would skew the choice. I am trying to think of a way to design a dual citizenship keeping in mind the long history of dual citizenship between Puerto Rico and the United States, one that is limited. That is, for example, the children of two Puerto Rican citizens post-independence should not, in my view, be allowed to have that citizenship, but perhaps would lose it under some circumstances of doing something inconsistent with a dual citizenship.

Mr. DENNIS. I think my remarks about the fact that we must make it clear, if the independence choice is made, that Puerto Rico is—whatever the statutory scheme, is moving toward a status in which over time the people of Puerto Rico will have Puerto Rican citizenship, and the number of those who wish to remain on the island and participate in the political process in the new nation will be, if they are not themselves, certainly the next generation will be citizens of the new republic of Puerto Rico. And I think that in that sense——

The CHAIRMAN. You say if not they, then their children, and I would certainly go along with that, but there was no special reason for denying them citizenship just by participating in an election. I mean, we allow citizens of the United States to participate in Israeli elections, do we not?

Mr. DENNIS. Yes. However, I must state again the administration is—it favors the requirement that a choice be made. Legally that can be done. It is not unconstitutional to allow that.

It would seem to me to be a bit difficult to envision how one takes a step towards full independence.

The CHAIRMAN. I understand the arguments pro and con. I am not interested in those at this point.

What I would like for you to do, if you would, is to help us design a choice for the committee, for this committee to make, not an election, but a choice whereby we could have a dual citizenship under independence which would be limited in that it could not be passed to the children unless they moved back and made some, you know, lived in the United States.

In other words, being born to two Puerto Rican parents in Puerto Rico post-independence would not grant an American citizenship even though their parents were citizens. And perhaps there should be some other limitations such as doing something inconsistent with American citizenship.

Mr. DENNIS. I can understand that certainly.

The CHAIRMAN. I have not thought it all through as to what those circumstances are, but I must tell you, I personally am moving in that direction. I think we can do that. I mean, my first inclination was exactly what you have said; that is, you go independence, you make your choice. And maybe this committee and maybe the Congress will feel that way. It is not an unreasonable way to feel. But I think we ought to explore an alternative.

Now, with respect to commonwealth, let me give you my general philosophy on what we ought to do on commonwealth. First of all, commonwealth is not independence, cannot be independence. As I have said, you cannot have your cake and eat it too.

However, to the extent that we can grant increased autonomy, self-rule without interfering with the federal national relationship, we should do so. I mean, we should not have a federal law applicable in Puerto Rico if it does not make sense.

The classic example is a building standard that requires snow-proof cement when there is no snow in Puerto Rico, no reason to do that.

Now, I share your view that the initial draft of the commonwealth wish list went too far. It tended to give a veto on any federal law which was a maze, which would be hard to get to. But I am trying to come up with a concept that would accommodate the realistic view to let Puerto Rico decide for itself where there is no need to do otherwise, and what I have in mind is this.

If there is a federal law of the kind and nature just described, inconsistent with Puerto Rico's economic requirements or culture or whatever, that does not at the same time and there is no overriding federal interest in uniformity, we can think of a lot of examples of laws that would fit into that, and if the legislature of Puerto Rico should adopt a law signed by the governor saying Congress, we think this is inconsistent, there is no national interest in this, would there be anything wrong with treating that request on a fast track?

You know, we have the fast track legislation that concerns the budget act and many other things. All it would guarantee is that such a law, if introduced, would be referred to a committee and that the committee would have to act one way or another within a certain time span. And if they did not, then a motion to discharge the committee would be in order, preference and priority over other motions on the floor.

In other words, if the committee did not act—the committee does not have to act favorably, but if they did not act at all, the committee could be discharged, the matter could come out on the floor. Then you would have a priority consideration under a time limit. I think we have ten hours under some proposals, 20 hours under other proposals, but let us say ten hours. No guarantee again that you would get a favorable vote, but at least you would have a chance to have it considered. The same thing in both houses. Anything wrong with that kind of consideration?

Mr. DENNIS. It is a very technical matter, and I do not pretend to be an expert on the procedures in the House and the Senate. And I would want to consider it carefully. But in general terms it would seem to me that if the Congress, if both houses of the Congress are inclined towards setting up procedures which would put the question of applicability to Puerto Rico in any legislation through a special parliamentary process to make sure that the special status of Puerto Rico and its relationship with the government of the United States is given due consideration, I would see nothing in theory wrong with that as long as that power and that oversight remains within the Congress of the United States.

I think our objection is that to delegate it away to the governor of Puerto Rico presents some very serious problems. I am thinking off the top of my head, but I mean in general terms it would seem to me that would be much less objectionable.

The CHAIRMAN. I am just trying to explore some ideas here. These are ideas that I have not cleared with anybody except trying to grope for a way to give Puerto Rico as much autonomy within the commonwealth concept as possible, but keeping in mind.

Under commonwealth the Congress still has the power—and by the way, under this proposal the President would still have to sign the legislation.

Mr. DENNIS. Yes.

The CHAIRMAN. It seems to me unnecessary to avoid the situation where Puerto Rico feels burdened by some law which is totally unnecessary and some insensitive people on Capitol Hill might say well, we will deal with that after we finish all the rest of our work, and somehow it never gets done.

Mr. DENNIS. Or might not be aware of it to begin with.

The CHAIRMAN. Exactly.

Now, on the question of rules and regulations, these are especially troublesome, I think, to Puerto Rico because, again, sometimes the rules are confected by some federal official who has other problems in mind other than the particular climate and economy of Puerto Rico.

Suppose we put together a proposal that says if a rule is made applicable to which Puerto Rico objects—let us say the governor files an objection. Then the agency that confected that rule would have to make findings that, yes, this is consistent with the statute, it is required for Puerto Rico, it should be made applicable or, conversely, that it should not be applicable because we were not thinking of Puerto Rico at the time and either make it not applicable or modify it and then give Puerto Rico a chance to traverse that by a legal proceeding pursuant to the standards of the Administrative Procedure Act that it is an arbitrary and capricious rule.

That is a very strong hill to climb for Puerto Rico unless they have a good case, but it gets them a hearing on rules and regulations which might be vexatious rules and which, under present rules, they have no right to do. Did you follow?

Mr. DENNIS. I understood, yes.

In general terms, I would certainly want to give that careful consideration.

One, of course, we are dealing with the rule-making authority of executive branch agencies or independent agencies, and also, we are dealing with a process that is basically open to the public in the sense that—I think in the Senate and in the House, perhaps, Puerto Rico would suffer from the fact that it does not have voting representation and to the extent that procedures here would——

The CHAIRMAN. I think the voting representation——

Mr. DENNIS. Procedures here would force procedurally a consideration of Puerto Rico's interest.

The CHAIRMAN [continuing]. Nor in the Senate do they have either a representative or staff. We have got a lot of staff up here to back us up. I would hate to say what we would be doing on this legislation if we did not have staff.

Mr. DENNIS. But in terms of rule making in your agencies, those are generally controlled by the Administrative Law Procedures Act, and there is a process of publication, of hearing the objections and considerations of those that would be affected. And I am not sure that that is not adequate, but let me take that particular proposal back to see whether or not there——

The CHAIRMAN. I will try to draft up something on that. You are beginning to get, I think, a little bit of the flavor on this and how fast the turnaround time.

I am not going to ask all the questions that I have. We have a lot of these proposals. We are going to need quick responses on them, and there is a lot to it.

Mr. DENNIS. I would like the opportunity to respond, in writing at least, to that proposal.

The CHAIRMAN. We will give you that.

Now, just a couple of other questions before I turn it over to my colleagues.

In S. 712 we provide in the event of a runoff that there be the two top choices. If no party gets 50 percent, that in the event of a runoff you have, let us say, statehood and commonwealth and then a third choice which is "none of the above" or independence and statehood and "none of the above," the idea being that if there is going to be a dramatic change in Puerto Rico's status, it ought to be supported at least by 50 percent plus one of the population.

We gave some thought to some kind of super majority initially, but at least on a tentative basis it is my view that the majority ought to rule, but at least it ought to be a majority. And if you are going to go to this radical change, it should at least get the 50 percent plus one. What is your view of that?

Mr. DENNIS. We agree. The majority rules. Plurality would not be sufficient in our view.

As I stated earlier, this is a very significant step. It really should have the support of a majority of the voters that would vote in that referendum, and so we support majority rule.

The CHAIRMAN. Thank you. My final question on the first ground here is we have been speaking of how to handle election contests, and our thinking or it has been suggested that we give the Supreme Court original jurisdiction on the limited question of certification of the election.

Do you see any problem with that?

Mr. DENNIS. I believe there may be some difficulty with that.

The CHAIRMAN. First of all, let me fill in the rest of the blanks. You have already stated this would be a federal election.

Mr. DENNIS. Yes, no question.

The CHAIRMAN. And I take it then it would trigger all of those laws with respect to federal election such as observers and all the civil rights acts and whatever.

Mr. DENNIS. The question of observers is one that we feel—I mean, the requirements for having observers is one that is very limited, I believe, under the Voting Rights Act, and it is limited to really a historic situation which is probably not applicable in Puerto Rico.

It is our feeling that the normal processes of conducting elections in Puerto Rico as they do for governor or any position requiring support of the voters is the process that should be employed for this referendum process.

However, in resolving—and we feel with regard to the differing views of those in Puerto Rico who favor one choice or the other that there will be sufficient oversight of the process.

Of course, criminal laws do apply.

The CHAIRMAN. Sufficient oversight by whom?

Mr. DENNIS. By the authorities in Puerto Rico in conducting the election. It is our belief that those elections should be conducted in the normal process, not requiring special oversight insofar as the Voting Rights Act is concerned.

The CHAIRMAN. There are those in Puerto Rico who very strongly feel that there should be special observers, federal observers. In order to do that, we would have to spell it out in the statute.

Mr. DENNIS. Yes, you would have to do that. Perhaps a record could be made that would support that. In general, we would like to treat the election process in Puerto Rico as we would treat the election process in any of the territories that have utilized a plebiscite in making a choice to or for statehood, but the necessity for federal observers, I think the burden would be upon those who request this special oversight to demonstrate that it is necessary.

However, I did want to say——

The CHAIRMAN. Let me make one thing clear, and that is I do not mean by even asking those questions to be taking any sides at all on the ongoing disputes in Puerto Rico. To put it mildly, politics in Puerto Rico is a lively sport, and it is a lot like Louisiana in that respect. And there are a lot of disputes, and I do not know whether there is anything at all to the disputes, but what we want to do is ensure a process that everyone agrees at.

I do not care if we overregulate it a little bit as long as everybody says well, by gosh, it is fair and that nobody has an added advantage. And that was one reason to put jurisdiction on the Supreme Court, not because courts in Puerto Rico are unfair, either state courts or federal courts. I do not mean to make that accusation at all, but because there are some people that have the view that they are partisan courts, it does not matter whether it is true or not.

If we can design a way to create jurisdiction somewhere that no one can disagree with, then we have a result that nobody will assail.

Mr. DENNIS. I think we can certainly agree that we want a process that is, in fact, fair, that the voters have confidence in, and we will work with you toward that end.

The CHAIRMAN. I think to that end you have to have some kind of observers. You have to have a recognized body of rules and the Voting Rights Act, I guess, and what have you. In other words, whatever the rules of the election are have to be adhered to.

I would urge that you go back to your shop and get your people who deal with elections to say all right, here is the problem. We have to design an election process that we have observers so there is—so not only is it a fair election, but it is perceived to be fair, given the history of Puerto Rico.

And secondly, that has—it seems to me you need a court of jurisdiction somewhere that is not only fair, which the courts of Puerto Rico I assume to be, but one that is accepted, and I guess you would have to go somewhere other than the federal courts there.

Again, there is not the slightest bit of evidence that I have that they are anything but as fine a judges as we have in the country, and I do not want in any way to leave any impression that I am making that accusation. But this is politics at its most immediate and zesty, and we just want to put it beyond anybody's argument because the result of this election, we want to be able to say, is the freely expressed self-determination of the people of Puerto Rico, that no one can disagree with.

We have had these plebiscites before, and they were not accepted for various reasons. The principal reason was, we did not fully describe what the choices were, and the choices were not self-executing. We do not want to allow that here.

Mr. DENNIS. Mr. Chairman, I just want to say certainly we do have confidence in the federal court system in Puerto Rico, that the judges there are certainly fine and upstanding members of the profession, and we feel that they would do their duty if that question were placed before them in terms of the certification of an election subject to any appeals that might be available to the Court of Appeals.

However, it is our view that the resolution of any disputes on certifying the election belongs in the federal courts, and the question of which court would have original jurisdiction we are certainly willing to discuss.

The CHAIRMAN. Well, please take a look at that and give us a proposal if you can very quickly.

I have a number of questions in writing, and we will have another round of oral questions, but with that, let me turn it over to Senator McClure.

Senator MCCLURE. Thank you very much, Mr. Chairman. There are, of course, a number of questions which will be submitted for response in writing, and I will not try to cover all of those issues, but I do want to follow up on a couple of things on the record this morning.

One, I am troubled by this question that the Chairman has been exploring with respect to the assurances which we can and should give with respect to the validity of an election. That will be tested not only by the subject of the courts of this country, but also tested in larger forums of international credibility.

We will ask questions of the State Department as well with respect to the latter. I do not expect you to answer those questions which are, perhaps, more in the competence and jurisdiction of the State Department, but I am concerned about the notion that somehow we are interfering, if I understood you correctly, interfering or denigrating the electoral process if we by statute direct some kind of special federal presence in this election in Puerto Rico. Did I understand you correctly?

Mr. DENNIS. That was my concern. We have federal courts in Puerto Rico, we have the United States Attorney's office in Puerto Rico. We have—the elections are not new to the commonwealth of Puerto Rico.

Now, certainly the commonwealth itself and those who we would feel speak for the political interests there, and the various interest factions on various issues are unanimous that something extraordinary needs to be done because of how much is at stake here. Clearly I would not argue with that. But I would feel there should be a presumption of regularity insofar as the election process is concerned in Puerto Rico.

Senator MCCLURE. I understand the generalized statement that there should be a presumption of regularity, but I am a little bit troubled by the notion that the only pattern of discrimination in elections may occur against blacks in the South. That seems to be almost endemic in our approach to civil rights in our country.

We never send observers to Chicago where there is endemic voter fraud, but we always send observers and marshal, to observe the elections across the South.

I think the patterns of a manipulation of elections may be more evident in Puerto Rico than they are in some other areas of the contiguous 48 states. I do not, by that statement, infer anything wrong with respect to Alaska or Hawaii. I suspect they are cleaner than Chicago or New York, and certainly cleaner than the District of Columbia.

Mr. DENNIS. We do leave to the states those issues of policing elections even where federal officials are standing for election, even for election of the President of the United States. And those processes in terms of ensuring the integrity of the election process are left to the states through their own processes.

Even though the issues being decided in a particular election are hotly contested, I do not feel that an election, let us say, for mayor of Chicago is an election that necessarily is not going to be hotly contested. People are going to feel strongly about it.

I do think that one of the main guarantees in the election process is the fact that you do have different points of view and that one party or one interest acts as a watchdog for the others, and I do not think that we should minimize that.

Of course, in the question of discrimination in the racial context, there you are talking about exclusion where individuals historically were just not—I mean, they could not eat or get to the polling place. They were not registered to vote, so they had no voice.

It is not a question of different factions actually going out and voting, watching the other faction, making sure that the election was clean in that the vote count was, in fact, was accurate. So, in that sense—and Puerto Rico has had a long history of handling its internal affairs insofar as electing its own representatives through the process of election. In fact, I daresay probably the mainland can take a lesson from Puerto Rico whose voter turnout is somewhere in the neighborhood of 90 percent. We wish we had 80 percent insofar as some of our presidential elections are concerned, but I mean, that is—again, I agree, we can certainly explore this issue. I am not saying it is an illegitimate issue at all.

Senator McCLURE. I thank you for the latter statement. I do not want to cast any dispersions on the electoral process in Puerto Rico which is not equally applicable to certain jurisdictions in the rest of the United States.

Mr. DENNIS. I understand.

Senator McCLURE. I suspect that we run into patterns that are very difficult for us to understand with respect to Indian voting rights. We might explore dual citizenship in that context as well because they are independent nations within the boundaries of this country.

We also have some very, very large problems with respect to their participation, their equal participation in voting. Although, probably only in a couple of states, or maybe three states, is it large enough numbers to cause national concern. New Mexico, Arizona, perhaps the Dakotas would fall within that description.

But certainly there are very large questions with respect to voter participation and the equal participation of those voters even though they may be hotly contested elections. I am just concerned. I think we need to explore that question.

My personal reaction is that if there is any doubt, we had better make certain that we can guarantee that the election is valid. That it is as free and open as we can make it. That we are able to say to the people of the United States and to the people of the world that we have done that. If we fall short of that test, we have not only fallen short of what we ought to do for the people of Puerto Rico, but we also do not live up to our own standards.

Mr. DENNIS. I certainly agree with that statement.

Senator McCLURE. If the Committee were to remain silent on the issue of dual citizenship, what would be the practical effect? Would dual citizenship exist in perpetuity?

Mr. DENNIS. I really do not know. I do not want to talk off the top of my head if we do remain silent on that. I do not believe we should remain silent on it. I know that. I feel we should spell it out.

That is too central I think to the issue of independence, and therefore, we should spell that out. I think the people who are voting should have a right to know as to how that status is going to be effected, but I do not know what happens if you are silent on it.

Senator McCLURE. I am aware of the conversation you had with the Chairman earlier with respect to dual citizenship and domestic legal precedent. And he used the example in which we tolerate—I do not know that we have a legislative pronouncement, but we tolerate U.S. citizens voting in the elections in Israel.

Are there other examples?

Mr. DENNIS. I cannot speak generically. I understand that there are individuals who may hold dual citizenship with the United

States and other countries, but again, I am not prepared to address that with any great specificity. It is not anathema.

I mean the concept of dual citizenship is not one that is necessarily anathema to our view of citizenship in the United States. A person can hold dual citizenship. I think our perspective on it is really to look at Puerto Rico as a whole, and to say what is the effect if independence is voted, and we were to permit all those in Puerto Rico to continue to hold both citizenship in the United States, those who would actually have the statutory citizenship.

There would still be a substantial number of those who were from the island of Puerto Rico who would have Fourteenth Amendment citizenship and would not be affected by this one way or the other. But those that have the statutory citizenship, what would be the effect of allowing that dual citizenship status to continue on indefinitely?

I think that that is where we are looking. We feel that those who vote for independence should have a clear understanding of how their citizenship status would be affected. And fairness is certainly an issue, but also I think a matter of full and complete disclosure is important.

Senator McClure. A citizen who has citizenship by virtue of the Fourteenth Amendment can renounce citizenship.

Mr. Dennis. Yes, they can renounce.

Senator McClure. Merely voting in a foreign election is not a renunciation.

Mr. Dennis. No.

Senator McClure. What does it take to renounce citizenship under the Fourteenth Amendment?

Mr. Dennis. I am not sure in terms of the actual legal process of renouncing citizenship. Obviously, it is a declaration of some sort. The question is whether or not it is sufficiently clear and unambiguous that it would be legally recognized.

For instance, someone who, let us say, fled to Canada during the Vietnam War and announced that he was renouncing his United States citizenship—I mean was not going to serve in the armed services—that sort of thing. An issue might arise as to whether or not that person has made an unambiguous statement.

I would say that is fairly unambiguous. But I am not sure of the case law, the legal technical requirements and how the issue might arise insofar as any court proceedings are concerned.

Senator McClure. Would you provide to the Committee, for the record, a more definitive statement of what it takes for renunciation?

Mr. Dennis. Oh, yes.

Senator McClure. I do not really want to get into, in that context, the question of the difference between the Fourteenth Amendment and statutory rights are concerned. I am concerned primarily with Fourteenth Amendment rights and renunciation of those rights. What constitutes such a renunciation that is recognized by the courts?

That might provide us some guidelines as the standards which we might wish to apply in both the Fourteenth Amendment and also perhaps to the statutory rights as well, and I say perhaps because there is a distinction.

Mr. DENNIS. Right. I understand. I feel confident that in terms of renunciation under the Fourteenth Amendment, it is an individual matter. Someone else cannot renounce it for you, obviously, and the election itself could not constitute a renunciation.

But beyond that, in terms of an individual seeking a legally secure renunciation of his citizenship of the United States, I am not sure what the cases say, but we will provide a written analysis of that.

[The requested information was not received.]

Senator MCCLURE. If you would. As I recall, somebody who during World War II served in the armed forces of a hostile country, by that act, had renounced citizenship.

Mr. DENNIS. That would seem pretty unambiguous to me, yes.

Senator MCCLURE. But people that served in the armed services of a friendly nation did not do so if I recall correctly. And the two examples I am thinking of are the incidents of those who served in the armed forces of Germany and those who served in the armed forces of Great Britain or Canada.

Mr. DENNIS. Right.

Senator MCCLURE. The Department bases its statement that Congress could condition citizenship acquired by virtue of birth in Puerto Rico on the basis that such citizenship was acquired outside the territorial boundaries of the United States since Puerto Rico has not been incorporated, citing *Rogers* v. *Bellei*.

Professor Tribe from Harvard University has submitted an opinion to the Committee suggesting that for the purposes of citizenship, Puerto Rico is in the United States by virtue of the Immigration and Nationality Act. Do you disagree with Professor Tribe?

Mr. DENNIS. Yes, we do disagree.

It is our position, and again, I want to separate legal theory from political reality. We do not consider it to be at all an issue that those in Puerto Rico with statutory citizenship are in danger of losing that by virtue of the fact that it is statutory as opposed to a constitutional citizenship.

So no one is considering revising that in any substantial way outside of the context of this independence choice. However, the point is that the power to create that citizenship status lies with the Congress, and that in that respect, it can be modified by the Congress.

So basically it is a matter that we would view as constitutionally fundamental that Congress can amend, repeal, or otherwise change laws that it has passed. And if my citizenship comes through congressional legislation, then it theoretically can be affected by congressional legislation.

Now, in the absence of a case in the Supreme Court of the United States that would say otherwise, at the very least, you have a constitutional difference of opinion. We feel that we are correct. That the Supreme Court would rule if the case ever came to court on that.

So we do disagree with Professor Tribe on that point.

Senator MCCLURE. Now, that is based on constitutional theory rather than statutory interpretation?

Mr. DENNIS. Yes, it is.

Senator MCCLURE. I want to turn for a moment to what we have referred to as an exclusive economic zone. On page 3 of your testimony, you state that the states are generally entitled to utilize submerged lands within a three-mile boundary. The Administration believes the same provision should be included in any act admitting Puerto Rico to the Union.

Are you aware that Puerto Rico has the right to utilize submerged lands up to three leagues or over ten miles?

Mr. DENNIS. No, I was not aware of that.

Senator MCCLURE. Would you look at that as a fact and determine whether that would change your opinion with respect to that jurisdiction question?

Mr. DENNIS. Yes, I will.

Senator MCCLURE. Or whether it should on a question of policy, not on a question of statutory interpretation?

Mr. DENNIS. I understand.

Senator MCCLURE. On page 4 of your statement, you state that when Alaska was admitted to the Union, the Federal Government made very significant land grants.

In the case of Puerto Rico, the Federal Government does not have that option. Alternatively, the statehood proposal provides for a grant of the right to explore and exploit the resources of the 200-mile Exclusive Economic Zone.

Is that not a viable alternative to the grant of federal lands as was done in Alaska?

Mr. DENNIS. It is analogous in the sense that it would bestow an economic benefit upon a newly admitted state that might have the same or similar economic impact as land grants would in Alaska.

The problem may come in insofar as the maritime jurisdiction is concerned that we do have a very substantial history and tradition in the United States of reserving the maritime jurisdiction to federal control. And to that extent, I think that that is a difference. It is not an economic difference, but it is certainly a legal difference and historic difference.

Senator MCCLURE. Yes, I would agree with respect to the exercise of maritime jurisdiction, but not with respect to the use of economic resources.

It seems to me that if the Federal Government asserts the ownership to the continental shelf, those are federal lands in the same sense that federal lands are onshore in other states.

Mr. DENNIS. Well, as you stated as a matter of policy, you do also have the question of the interest that states that are postured on our coasts, both the Atlantic and the Pacific, I am sure would be interested in similar rights.

And in part, I think that we have to consider the fact that making that concession in this context does open the door to not legal claims but political claims by other states to similar advantages.

And so I would only caution that our position is considerate certainly of those realities as well as the fact that the tradition of restricting the economic exploitation by a particular state of resources off of its shores is limited. And that the broader economic interests further out to sea are basically within the federal jurisdiction and really are regulated by the Federal Government.

And we would want to continue that because of the unique nature of marine resources as opposed to other types of resources.

Senator McCLURE. Those who have marine resources think they are particularly unique. The state of Idaho does not have any seashore, but we do have a lot of public lands. Without debating the issue of whether or not the Federal Government should have asserted the right, and whether or not the Federal Government was right in the conclusions that were reached that the states' jurisdictions stopped at three miles, which I do not happen to agree with and did not agree with at the time it was done and do not now, but nevertheless is a fact, those are public resources.

Those are federal interests under current and existing law.

Mr. DENNIS. Yes.

Senator McCLURE. And if we as a matter of policy decide that we should assist the state of Puerto Rico if they adopt statehood by granting certain rights in those public resources seems to me to be analogous to what was done in the state of Alaska in granting public lands.

Mr. DENNIS. I understand your position.

Senator McCLURE. In testimony before this Committee, witnesses from the Independence Party have proposed limiting those qualified to vote in the referendum. In addition, representatives of the commonwealth party have suggested expansion of voter eligibility to include Puerto Ricans living on the mainland.

We note on page 6 of your testimony that you find the independence option fails to pass muster under the Fifth and Fourteenth Amendments. Would you have problems with permitting people who are not domiciled in Puerto Rico to vote in this referendum solely on the basis of Puerto Rican ancestry, or should the current voter eligibility requirements of Puerto Rican law be maintained?

Mr. DENNIS. Our position is that we are willing to entertain an expansion of the right of suffrage to those from Puerto Rico who are currently residing on the mainland.

The interests we feel are sufficiently close and weighty insofar as those residents are concerned that they should have a voice in the process. Certainly the option of statehood and the option of independence would change the status of Puerto Rico probably forever or at least for generations that are foreseeable.

I am sure that many of these residents have family that are in Puerto Rico, still maintain a fairly close relationship with the island, and therefore we are not inclined to be very limiting insofar as the right of suffrage on this particular referendum is concerned.

Senator McCLURE. We have already had some discussion with the Chairman with respect to the section 936 provision of the Tax Code and whether or not it could be phased out.

You answered yes, indeed, it could be phased.

Mr. DENNIS. Yes, it could be phased.

Senator McCLURE. Can you give us some guidance on the parameters that the Constitution imposes on the transition period for such a phaseout?

Mr. DENNIS. There is no particular cutoff. Obviously, it must be determinate so there must be a cutoff. It cannot be perpetual or indefinite.

And depending upon which constitutional scholar you ask, you will get a different answer in terms of when you reach the point of, even if it is determinate, of running afoul of the uniformity clause.

I would say that again it is a matter that Congress' judgment may be as valid as any others in terms of evaluating, and it certainly is, in terms of evaluating the precedent and determining which transition insofar as these tax benefits are concerned would pass constitutional muster.

Senator McClure. Would there be a problem with grandfathering existing Section 936 investments?

Mr. Dennis. Yes. There would be in the sense that for a transition period that is not a problem, but if these benefits are ones that in terms of the taxing aspect are ones that are not uniform insofar as the other fifty states, it would be subject to constitutional challenge.

So if you pass the legislation, you could end up with the Internal Revenue Service challenging it, and it being overturned, and that is really the risk in our view.

Senator McClure. Is there any way in which the benefits of Section 936 could be rewritten in a different form in order to escape the difficulty under the uniformity clause?

Mr. Dennis. Well, we feel there are distinctions between the tax treatment and benefits that might be afforded to business enterprises in Puerto Rico in order to achieve the no net loss, no net gain insofar as the process is concerned.

There are fewer limitations on non-tax type benefits that can be bestowed by the Congress than there are tax breaks that can be given.

Senator McClure. But what I was really exploring was what are those ways in which you might achieve the same result without it being expressed as a tax preference.

Mr. Dennis. I think what you would have to do, and this is the great difficulty, and again the real problem is how specifically you want to spell that out in this legislation.

But it seems to me that you would almost have to look at the tax benefit that is going to be lost, the period in which that is going to be phased out, and determine what concomitant benefit outside of the taxing realm should be an offset so that the basic economic soundness of the island is not destabilized.

I am not prepared, obviously, and am not in a position to really be able to spell that out, but again, the question may be to what extent we would be able to in this legislation or would desire to state other than a general principle that appropriate offsets would be enacted.

Senator McClure. I will not take the time this morning, but I will submit questions with respect to the current coffee tariff or the treatment of a portion of the excise taxes for your response in writing.

Your statement was silent on the question of language.

Mr. Dennis. Yes.

Senator McClure. And yet the question of language is one of the very real considerations in the minds of Puerto Ricans and in the minds of the Congress.

Sections 17 and 18 of the statehood proposal purport to assure Puerto Rico a reserved state right under the Constitution to continue both English and Spanish as its official languages.

What would be the practical effect of these provisions, or to put it in another way, if Congress were to remain silent on the issue of language, and given that the United States has no official language, would the practical effect be any different than if these two sections were enacted?

Mr. **Dennis**. Well, we believe that the Congress should remain silent on this issue. If Puerto Rico becomes the 51st state, and I am not encouraging or discouraging this, they would as a state have the power to make declarations with regard to the status of the Spanish language in Puerto Rico as has been done I believe in the State of Florida.

I do not believe, however, that it is necessary to turn this referendum on the status of Puerto Rico into a referendum on the Spanish language or Spanish versus English. I quite frankly feel that it is not a controversy that needs to be resolved in this particular process.

Independence brings with it obviously the full range of self-determination on any and all of these issues, and statehood is not very limiting in that regard either. And if commonwealth status is maintained or enhanced, if that issue with certain limitations needs to be addressed, it can continue to be a subject of political debate and action within the Commonwealth of Puerto Rico.

I know that there will be testimony with regard to the use of the Spanish language in the federal courts, and that to me is a different issue.

Senator **McClure**. I will reserve those questions for those witnesses.

Mr. **Dennis**. Right.

Senator **McClure**. Thank you for your answer. Just one final area I want to explore for a moment, and that is the portion of your statement that objects to the negotiation with an independent entity of Puerto Rico, a new republic or whatever they might determine was their form of government under independence, such things as base agreements, status of forces agreements, and other similar arrangements. And you have suggested, if I understand it correctly, that we cannot write in the legislation something which would be a matter of relationship with a future independent entity. That must await a negotiation between the Executive Branch by the President of the United States with the appropriate authorities in the newly established independent government.

Mr. **Dennis**. I think that is correct although certainly the Congress can urge that such negotiations be carried out promptly upon the election of the independence option.

Senator **McClure**. I am troubled by that answer, and let me tell you why I am troubled and then ask a question.

I am troubled because there is not any way the Congress of the United States can know what those arrangements will be before they offer them independence.

Mr. **Dennis**. That is correct.

Senator **McClure**. And it is likely, under those circumstances, the Congress is not going to offer them independence. So you may have set up intentionally or unintentionally a barrier to an independence option.

Mr. DENNIS. Well, I do not think there is any more of a barrier than there is let us say to the statehood option, keeping in mind the fact that perhaps all of the details of the transition insofar as the economic transition would not necessarily be spelled out, or that the issue of language under an enhanced commonwealth would not be spelled out.

I think that all options are going to suffer some of those disadvantages. It would be our view, though, that if we stay on the core of those concepts in terms of statehood, independence, and commonwealth status, that you stand the best chance of at least giving a reasonably clear picture to the average voter of what it means to pull one of the three levers.

Senator MCCLURE. I understand the pure theory analysis of what independence means. We have no conditions, no limitations. You are independent. You can do whatever you want to. We will try to arrange with you in the future for things that are mutually satisfactory to both of us.

Mr. DENNIS. Right.

Senator MCCLURE. That is the pure theory of independence.

Mr. DENNIS. But it would not be quite that arms' length. I think as a practical matter, I am sure it would not be quite that arms' length. But as a legal matter——

Senator MCCLURE. How much closer than arms' length can we get, and not run afoul of the objection of the separation of powers which you have raised?

Mr. DENNIS. I do not think we can get very close legally. I mean, obviously, those relationships and attachments you still have got a very significant political force within the body of the United States represented by those who are going to be citizens or continue to be citizens and vote in elections.

And so I think that as a practical matter, the government will continue to be responsive to these issues. But as a constitutional matter, we do not believe that this despite how attractive this may seem, that we can preempt the constitutional authority of the Executive Branch insofar as spelling out what will be essentially a treaty relationship and make it self-executing in the form of this referendum.

Senator MCCLURE. Speaking as one member of the Congress, I will be very reluctant to vote for any expression of independence that says MIGs can be stationed at Roosevelt Roads.

Is there a way in which we can limit, in advance,, of such a treaty arrangement, a conditional independence that says foreign military forces are not going to be established on the island?

Mr. DENNIS. Again, I think that our approach is that independence is independence. Now, I do not have any, and it may be a bit provocative to assume that if the people of Puerto Rico vote for independence that there are going to be hostile military relationships between the United States and Puerto Rico. I mean none of us envision that as being a likely evolution of our relationship under independence.

So I do not want to in addressing this question to give that impression at all, but if Puerto Rico is independent, at least outside of the period of transition, it will be a nation that will be able to determine its own destiny. And that would involve certainly its relationship to the United States on a military basis.

Senator McClure. Let me pose this question on a legal basis, and not as a policy question. Would it be possible for us to establish a process by which the voters of Puerto Rico could vote for independence but no proclamation of independence would be granted until an appropriate treaty was entered into and spell out the conditions of such a treaty?

Mr. Dennis. It seems to me that is possible. I would certainly want to think on it. It may be legally possible.

Senator McClure. Would you think on it, and then give us your advice after having thought about it in a response in writing to the Committee?

Mr. Dennis. Certainly.

The Chairman. Would the Senator yield at that point?

With the freely associated states of Micronesia, we have provided for a denial on defense, and I believe we have provided a mechanism by which after the election, there would be an implementing agreement between the United States and the freely associated states, so that I think that that legislation followed by the referendum in the freely associated states either rose to the dignity of a treaty, or maybe it was the requirement of the later implementing agreement that did that.

But there has got to be a way to do that, and I think the freely associated states may give the model for doing so. Perhaps we could condition the act of independence upon the signing of that treaty or something immediately afterwards, but there has got to be a way to do that. Thank you for yielding.

Senator McClure. That is really what I was suggesting is a way in which we can get around the separation of powers obstacle which you have suggested.

Mr. Dennis. Yes.

Senator McClure. And I am groping for that way, and it seems appropriate to me that we could say to the President of the United States and to the people of Puerto Rico before they vote that if you vote for independence, before that proclamation can be issued, there will have to be a treaty, appropriate agreements that have been negotiated and signed and ratified or consented to by the Senate of the United States before the President can issue the proclamation which triggers the independence.

Mr. Dennis. I would think that is legally feasible. Again, off the top of my head, but I would want an opportunity to study it.

Senator McClure. I thank you very much. Thank you, Mr. Chairman. I do have a number of other questions as I am sure other members of the Committee will have to submit in writing, and before yielding the floor, I would like to say to Mr. Dennis, my very real appreciation for your appearance and testimony here this morning.

You have been a very capable witness, and I appreciate your testimony. Thank you very much.

The Chairman. Mr. Dennis, on limits on expenditures, what power do we have under *Buckley* v. *Valeo* to put limits on expenditures both independent, corporate during these elections?

Mr. DENNIS. Limitations on corporate contributions to the various positions?

The CHAIRMAN. Limitations of any kinds.

Mr. DENNIS. I believe the limitations can be placed upon corporate contributions. The issue is whether they should be placed upon corporate contributions, and to what extent they should be placed.

I must confess I am not conversant with the nuances of federal election law. I do have Mr. Donsanto who I had asked to be here today because I was afraid I would get a question that would be very technical on election law.

And if I might permit him to respond if he can to your particular question on that.

Mr. DONSANTO. Thank you. I understand, Senator, that your question is under the Buckley case the extent to which expenditures to this particular plebiscite could be limited.

The Buckley case says that expenditures as a general principle cannot be limited quantitatively, however, the Supreme Court has also said in other cases that the expenditures by corporations, labor unions and other such special type of organizations can be prohibited.

You cannot forbid individuals from making expenditures, but you can limit corporations.

The CHAIRMAN. Can we limit corporations from making independent expenditures?

Mr. DONSANTO. The Federal Election Campaign Act presently contains such a—It is not a limitation. It is an outright prohibition on participation by corporations in the federal elective process. I do not see any reason why that could not be done for a referendum like this which is a federal issue.

The CHAIRMAN. We are talking about independent expenditures by corporations. I am not taking about Exxon giving a contribution to a political party on behalf of the election. I am talking about Exxon making independent expenditures on this issue.

Mr. DONSANTO. Well, again, Senator, this is basically a question which falls within the original jurisdiction of the Federal Election Commission, and I would defer to their judgment. However, there is presently in the code a statute that has been on the books since 1907.

The CHAIRMAN. No, this is the Buckley case.

Mr. DONSANTO. The Buckley case says that you cannot limit individual expenditures. You cannot place limits on the ability of an individual person to expend his money, to express his opinion.

The CHAIRMAN. There has been no case on a corporation?

Mr. DONSANTO. I believe—I am really not certain that this aspect of Section 441(b) has been addressed by the Supreme Court. I think that generally speaking this aspect of the corporate expenditure statute is constitutional, has been upheld.

Mr. DENNIS. So that as I understand it then the limitations can be placed upon corporations.

Mr. DONSANTO. On corporations and labor organizations such as fall within the scope of the present statutes.

The CHAIRMAN. We have got to check that out. Staff is telling me that there is a Massachusetts case involving a Right-to-Life group where their independent expenditures were upheld but apparently that was not a corporation.

Whether the corporate entity would make a difference under the First Amendment, I do not know.

Mr. DONSANTO. Senator, that was the Massachusetts Right-to-Life Committee, and that was an incorporated organization whose primary, if not sole, function was to engage in expression. And the Supreme Court said that such a not-for-profit corporation whose sole mission was to engage in expression could not be constitutionally limited in its ability to express its opinions.

The CHAIRMAN. Well, why do you not get us a memo on the limits of what we can do. I am not saying what we should do, but we need to know because when we go into markup the Committee is going to want to, you know, they may want to limit, for example, 936 corporations.

I mean we may come to the conclusion that Massachusetts Right-to-Life case, that the First Amendment protects corporations as well as individuals. Maybe not. But if that is the conclusion, there may be another way to limit 936 corporations and simply say you cannot limit 936, but you can lose your 936 status like we do with 301(c)(3) corporations.

Mr. DENNIS. And those would be commercial entities. I mean they would not be of the type that were apparently involved in this case in Massachusetts.

The CHAIRMAN. Yes. Well, we will want to get that memo on that. Now, on this question of language. It is a very hot political issue in Puerto Rico. I wonder what practical effect it really has outside of court cases.

There is no official language of the United States.

Mr. DENNIS. That is correct.

The CHAIRMAN. What would it mean if there were an official language of the United States?

Mr. DENNIS. I am not sure. At least as I have seen it or understand it in countries like Switzerland, for instance, where you have three official languages, German, French and Italian. It is a matter of official documents being in a particular language. It is a matter of certain requirements insofar as the use of a language for official purposes.

So in general terms it may be limited to that. Perhaps the requirement could be broader. But in my view, in this context, it may be more symbolic. I feel that the referendum should not be a referendum on whether you prefer Spanish over English or English over Spanish.

I think under either three of the options, statehood, commonwealth status, or independence, the people of Puerto Rico can have a substantial say in how prominent Spanish is. I mean Spanish is very prominent in Puerto Rico now in its commonwealth status. And as a practical matter, I would imagine that would continue under any three options.

The CHAIRMAN. Well, that is what I have been saying.

Mr. DENNIS. Yes. If you do get into a situation where one option becomes identified with flexibility to somehow vote for Spanish, I think you are getting away from the real issues here.

So that is the reason for favoring really not having the language issue as a part of the referendum process. I do not think it is necessary and I do not think it advances the ball either one direction or another.

The **Chairman**. I submit that that issue produces more heat than light.

Mr. **Dennis**. Light, exactly.

The **Chairman**. We used to have a colleague named S.I. Hayakawa from California whom we all liked and revered very much.

Mr. **Dennis**. Great linguist.

The **Chairman**. Great linguist. And he at one time had some resolution, I think it was the sense of the Senate resolution, that English should be the official language of the United States. And I think people rushed out and voted for it. Much to my embarrassment I find that I voted for that too.

But I think that was more sort of an expression of respect for Hayakawa and of a thought of the moment. I think since then there has been no movement toward making English the official language, and that was only a sense of the Senate. And I think most people who voted for that realized that it is only a word, a name, a gesture. It does not mean a thing.

And I have been telling the statehooders especially that be silent on it. Nothing is going to change. Nobody is going to send the thought police down to Puerto Rico and say you spoke English and we are therefore going to put you in jail, or you have to start signing your name in English instead of Spanish or whatever. You agree with that?

Mr. **Dennis**. I agree with that. I do think absolutely there is just more heat than light in that issue, and I do not think that under any of the three options that really it should be considered weighing in one direction or the other.

The **Chairman**. Now, Mr. Dennis, we need to have reliable figures, reliable estimates as best we can on the costs of all of the programs. Some programs are entitlement programs paid to individuals. Some are discretionary programs spent for the benefit of Puerto Rico.

For example, what the Corps of Engineers spends down there. They are out there right now for example shoring up the foundation for El Morro, and there are a lot of other Corps of Engineers projects.

We want to be revenue neutral, but we do not want to take away the infrastructure of Puerto Rico without providing means to replace that. For example, on an independence, I think we have got to allow for a transition period before they can get their house in order. And the same thing is true of statehood.

So to figure out what a revenue neutrality is, we need to know what we are spending now in each of the categories. Now, all these categories do not fall under you, but if you are going to be the coordinator, we have got to count on you to be the expediter.

And I do not know whether we are going to get all that information in hearings this afternoon and on Thursday. I hope so, and I hope we have it in great specificity. But would you undertake to get OMB and everyone to release that information post haste?

Mr. DENNIS. We will get the word out that that is an area of particular interest, and we should be prepared to address it.

The CHAIRMAN. All right. Now, under independence, while on the one hand we want to have a self-executing act granting independence ipso facto upon the vote, it seems to me there are two caveats to that. The first is we have got to be sure that the denial on base rights rise to the dignity of a joint agreement if not a treaty.

And there might be some interregnum. I would not think very long in time depending on what you resolve as being the legality of that. And, secondly, it seems to me that we need two periods of transition. The first period would be a period in which everything stays in place.

For example, Social Security stays in place so that those whose Social Security payments have not yet ripened would have a period of time within which to continue to pay in. Let us say they are two years away from retirement on the date of independence; there ought to be a period of time.

Mr. DENNIS. Certainly.

The CHAIRMAN. It seems to me three years would be a reasonable period within which nothing changes on Social Security. The employers on the island continue to pay in. Everything stays the same because it would take awhile under independence to put together another form of government.

Also, on the question of Medicare. You have got a whole infrastructure down there administering that program as well as VA hospitals. Well, all of these federal agencies. And it seems to me that we ought to have that period in which everything stays in place subject of course to what Puerto Rico wants.

I mean we do not want to force this on them. But having talked to the independence group, I think that they recognize there needs to be this period of transition. Do you see any problem with that?

Mr. DENNIS. No. If we are going to respect the choice of independence, I do not think we can take the position that we are just going to pull the rug out from under Puerto Rico economically.

The CHAIRMAN. Well, not just economically. I am really not talking about transition grants here. I am talking about a period of say three years when the Corps of Engineers continues to do work on El Morro. VA hospital infrastructure continues to administer the hospitals.

Mr. DENNIS. Exactly. Social services, the basic infrastructure of society in Puerto Rico, the disengagement would have to be carefully crafted, and it would have to be with due consideration for allowing Puerto Rico the maximum opportunity to be a viable, independent nation.

And obviously that is not a simple matter, but I think certainly we would agree in principle that if that is the choice of the people of Puerto Rico that we would consider it our responsibility to work with the newly formed government to try to work those details out.

Obviously, there is a question, and again, it is one that I think may be very fundamental for the Committee to make a judgment on, and we will certainly want to have input on it is how much specificity you want to try to achieve insofar as the legislation is concerned prior to the vote on the referendum.

My own preference is to basically try to pronounce general principles under which any transition would be carried out except on certain issues like citizenship, perhaps several others, to avoid turning this into three separate codes, one for each choice that spells out every detail.

The CHAIRMAN. Well, we want to spell it out because if you do not spell it out, then the argument is made that you lose all these benefits under whatever the choice is, and it is a very salient argument. I mean just the very chance, just the illusion in one of these legal memos that Puerto Rican citizenship is somehow less than constitutional citizenship caused a big stir in Puerto Rico.

I think we have gotten the people of Puerto Rico reassured on that, that their citizenship is for all practical purposes indefeasible, permanent, cannot be changed by the Federal Government, except in a context of independence or some extreme situation like that.

So just to say well, we will take care of you. Do not worry about it. I do not think is going to be good enough to grant a real choice. Obviously, there is going to have to be, if Puerto Rico is independent, a period of negotiation. But we want to spell out I think, first of all, a period of time within which everything says in place while they are adopting a constitution, electing a legislature, figuring out how to replace the Social Security system, the grant system and all of that.

Mr. DENNIS. Well, yes, that sounds reasonable. I think in terms of obviously benefits, entitlements, Social Security, for instance, it certainly would not seem to me to be fair for someone to have contributed into Social Security up to a certain point and then be sort of unceremoniously booted out of the system because of this change.

I mean those matters I think can be spelled out insofar as this legislation is concerned.

The CHAIRMAN. What I am thinking of with respect to the period after. Let us say three years. We have not agreed on three years, but to use it as a rule of thumb. After the three years, it seems to me there ought to be a period within which we give transition grants to replace what we are not spending on food stamps, Medicaid program for example, and on Social Security with respect to those who did not vest within the three year period, that we make a block grant payable over years from the Social Security fund equal to the payments plus accrued interest.

Does that seem reasonable?

Mr. DENNIS. That seems reasonable. Again, I would defer to the various agencies that administer the programs in terms of what is an equitable way of having these programs phased out. Obviously, that is going to be a period of transition, and it may be an extended one.

But again, the purpose here, I think the assurance here is that those that would vote for independence should not lose at least those entitlements that they have invested in insofar as contributions are concerned, or if they are going to lose an entitlement that it is going to be a very gradual process that is going to allow for either some other alternative form of benefit.

The CHAIRMAN. I mean we want to allow for a transition period, but the loss of the entitlement would be rather abrupt at some point because you cannot be half on Social Security and half on Puerto Rican social security. You have got to pick a time.

Mr. DENNIS. But each of these programs has a different base. I mean for Social Security at least in part it is actuarially supported by the contributions of the workers and the employers. Other benefits may not have the same structure, and what would be fair for one program may be unworkable for another.

So again I think in principle we would try to make the transition as reasonable as possible, but you are going to have to really get down into the details of each of these programs in terms of coming up with a formula that you feel is appropriate and makes sense and is basically fair both to the American taxpayers and to those that are going to be, if the independence option is chosen, casting their lot with the new republic.

So again, it is a question of whether or not all of those details should be worked out in advance. I am sure that they can be. On the other hand, I would not want to get bogged down into too much controversy over some of the details of these arrangements particularly since you are dealing with contingencies.

We do not know which option is going to be chosen, and we certainly would not want to have the whole referendum jeopardized because the effort to achieve a certain specificity proves to be more than we bargained for.

The CHAIRMAN. Mr. Dennis, with some eleven pieces of property I am advised that are spread between various agencies, and we are having some difficulty getting descriptions and information about these pieces of property, if you would be the point person on that.

For example, on Defense, there are probably more than eleven pieces, frankly. It is section 18 of the commonwealth proposal on historic sites on transfers. Now, there are more pieces of property involved than that. There is the defense property. I do not think we are having any problem on getting the defense. I think defense is okay.

But the historic sites I think are spread between Interior, Coast Guard, Customs.

Mr. DENNIS. The question of ceding those to newly independent Puerto Rico, if that is chosen.

The CHAIRMAN. To the Commonwealth. It is really a question of need. Again, if the general philosophy under commonwealth is that you give Puerto Rico as much autonomy as they ought to have except where there is a national interest, on some of these historic sites, it cuts the question very finely.

We have to decide whether on the one hand there is a national interest in it, whether that national interest can be satisfied by granting title to Puerto Rico with an operating agreement, for example, conditioned on an operating agreement, or whether that helps the situation.

In other words, whether we should just give the whole El Yunque, El Morro, et cetera, give it to Puerto Rico. My feeling is that for example in El Yunque, that is the rain forest, that it is well-run. That there is a national interest in that and more than that a national capability given the fund of trained environmentalists and horticulturalists and all of that who can come down there from time to time.

And there is also a large Puerto Rican presence, predominant Puerto Rican presence among them. But we need to get that information. Where it is not necessary, El Morro may be something different from El Yunque and all these other pieces of property there may be special provisions. But if you would undertake to get that.

Mr. DENNIS. I certainly will, Mr. Chairman.

[The requested information was not received.]

The CHAIRMAN. The Senate was critical of the Commonwealth's proposal that presidential appointments be made only from a list.

Mr. DENNIS. Mr. Chairman, could I respectfully request a slight recess?

The CHAIRMAN. We are getting ready to shut this down in just a couple of minutes.

You were critical of making these appointments from a special list, and we were as well. Do you see any problem in saying that these appointments of federal officials to be resident in Puerto Rico shall be made after consultation with the Governor of Puerto Rico?

Mr. DENNIS. After consultation with the government of Puerto Rico.

The CHAIRMAN. Putting no limitation on the discretion of the Executive, but saying you have got to discuss it first.

Mr. DENNIS. I think there may be constitutional problems with that, in terms of making that a legislative requirement. I mean, as a practical matter——

The CHAIRMAN. Well, we are not making it a constitutional requirement; a legislative requirement.

Mr. DENNIS. Making a legislative requirement, which would somehow——

The CHAIRMAN. Oh, I think we do that all the time. I have not heard it questioned as being legal, but we always say, "after consultation with."

Sometimes we put experience qualifications on presidential appointments. I mean, again, it seems to me, consistent with this philosophy. There is no reason not to do it as a practical matter, it seems to me, and every reason to do it as a matter of good policy. I mean, that is something that every executive ought to follow.

And if we write it into law, at least they know over at White House Personnel that before you appoint the head of the National Park Service at El Yunque, or before you appoint a director of this group or that, you call up and say, "What do you think about this guy?" And they say, "Well, we do not like him." And you say, "Well, we are going to appoint him anyway." Or that, "Okay, we will find somebody else."

Mr. DENNIS. I know we may disagree, but I feel that there are constitutional difficulties with that. The power of at least making the nomination, if it is a matter of—obviously, an appointment that requires advice and consent of the Senate is with the President, and I think that that is the way, unless there is a constitutional amendment, it must remain. And if it is not a position that requires the advice and consent of the Senate, then the President is free to make that appointment within his discretion.

Now, as a practical matter, there is consultation, but that is within the political process.

The CHAIRMAN. Well, I think you will find just thousands of restrictions put upon the President's appointive power on less-than-Cabinet officials—on lesser officials, the whole civil service system, for example, is a limitation on the President's appointive power. And surely it does not do violence to the Constitution to say that before you appoint the head of the INS in Puerto Rico, you consult.

Mr. DENNIS. I am assuming that is not a civil service—I mean, if it is a civil service position, then obviously we would be constrained by civil service restrictions.

The CHAIRMAN. Well, look at it over there. Because I would think we would do it if it is constitutional. I cannot imagine the President going to court to say it is deeply offensive to the Constitution that I have to have my personnel man make a phone call or write a letter.

Mr. DENNIS. I am sure that happens. I cannot imagine that we—not only for Puerto Rico, but for any state—any appointments made without consultation with officials there, if it is an appointment, as opposed to a civil service position. So I am confident that that happens.

But if it were to be more than window dressing, and I would assume that we would not engage in having legislation that would be meaningless, I feel that, at least insofar as the appointment authority of the President, it would present some problems.

The CHAIRMAN. All right.

If there is nothing further to add at this point, Mr. Dennis, we will stand in recess until 2:00 p.m.

Mr. DENNIS. Thank you, Mr. Chairman.

[Whereupon at 12:20 p.m., the committee was recessed, to reconvene at 2 p.m. this same day.]

AFTERNOON SESSION

The CHAIRMAN. The hearing will come to order.

We continue this afternoon with our hearing. And we begin with a panel, with Hon. Stephen G. Breyer, Circuit Judge of the U.S. Court of Appeals for the First Circuit, representing the Judicial Conference of the United States; and Hon. Levin H. Campbell, Chief Judge of the United States Court of Appeals for the First Circuit, from Boston, Massachusetts.

Your Honors, we are pleased to have you as a panel here. As you know, your full statements will be put into the record. If you would prefer to summarize, we would be glad to have that, but you may proceed as you wish.

STATEMENT OF LEVIN H. CAMPBELL, CHIEF JUDGE, U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT, BOSTON, MA

Judge CAMPBELL. Thank you, Senator Johnston. We are honored to be here today at your invitation.

I am Levin Campbell, Chief Judge of the U.S. Court of Appeals for the First Circuit. For many years, the First Circuit in Boston has included within it the U.S. District Court for the District of Puerto Rico. We are very proud of our long-standing relationship with the District of Puerto Rico.

In 1988, nearly 400 appeals from the District Court in Puerto Rico were filed in the Court of Appeals for the First Circuit. Many of these appeals are heard in Boston at our court's monthly Boston sittings. But, in addition, a panel from our court sits in San Juan in November and March of each year.

Just to note the size of our involvement, I would point out that the number of appeals from the District of Puerto Rico heard in the First Circuit is almost as large as the number we hear from the District of Massachusetts.

My testimony relates solely to the commonwealth option provisions in S.711 and S.712, providing specifically, that if any parties request, federal court proceedings in Puerto Rico shall be conducted in Spanish, rather than as currently, in English. These language provisions are part of a number of fairly major changes in the role of the District Court that appear in the commonwealth option. And I will limit my testimony to the language provision.

Judge Breyer, who will be testifying on behalf of the Federal Judicial Conference, will speak to the other provisions.

In 1978, Judge Frank Coffin and I testified before Congress on a previous bill to allow federal court proceedings in Puerto Rico to be conducted in Spanish. We pointed out then that a Spanish language option in a United States district court presented serious practical difficulties of implementation, primarily because of the difficulty of conducting an appeal from a Spanish record to the next level of federal court, to the Court of Appeals, which is an English-speaking court.

The present language proposal is far more sweeping than the 1978 proposal was.

The CHAIRMAN. What do you mean the present proposal?

Judge CAMPBELL. The proposal in the legislation that I am speaking to that the commonwealth definition would include.

The CHAIRMAN. The commonwealth. Okay.

Judge CAMPBELL. That provision provides that, at the request of any one party to a lawsuit, all the proceedings in the federal court would thereafter be conducted in Spanish. The proposal that came up 10 years ago required the agreement of all the parties in the case, and I think also was in the discretion of the presiding judge.

All my fellow judges and I regretfully but unanimously believe the present proposal would cause enormous problems of implementation. We are joined in this position by all seven of the Federal District Judges now sitting in Puerto Rico; all of whom, of course, are themselves native Spanish speakers, but who do not believe that Spanish should be an option, as well as English, in the District Court proceedings.

A separate resolution to this effect, signed by the Puerto Rico District Judges has been filed with your committee. And of course I filed a more extended statement than I have any intention of making here.

Let me make clear that our opposition to having this option of using Spanish in the Puerto Rico District Court in no way reflects hostility to the Spanish language, nor insensitivity to the concerns that have propelled this language proposal.

Several years ago, our court upheld as being constitutional Puerto Rico's local requirement that Spanish be used exclusively in the Commonwealth's own domestic court system.

Our position here is merely that in the very small seven-judge, Article III, United States District Court for Puerto Rico, the language spoken should remain the same as that used throughout the federal judicial system, and throughout our entire Federal Government.

To introduce another language will greatly slow down, and may cripple, the ability of the Federal Courts of Appeal to review the decisions of the Puerto Rico District Court. Additionally, the proposal threatens to isolate the Puerto Rico Federal Court and its bar from all other Federal courts.

While we recognize that the availability of Spanish would have some desirable features for some people, the tradeoff, in terms of the diminished ability of the Federal Court in Puerto Rico and of the Court of Appeals to administer justice, seems to us to make the proposal undesirable.

Now I have already outlined in my statement, my reasoning, and I would like to limit myself to giving the three principal reasons why we think this is undesirable.

First, permitting one party in a multi-party case to require all proceedings in that case to be conducted in Spanish, threatens to effectively close the District Court in Puerto Rico to non-English speaking attorneys.

That means that government attorneys from Washington, such as strike force prosecutors, Justice Department attorneys, Labor Board and tax attorneys, and others, who today routinely appear in federal courts around the Nation, including in Puerto Rico, would be unable to appear unless they happen to be Spanish speakers, provided one party in the case chose Spanish as the dominant language.

Recently, one of the Puerto Rico District Judges, Judge Accosta, has been ably presiding over a consolidated proceeding, composed of the hundreds of lawsuits arising from the tragic Dupont Hotel fire in San Juan. Somewhere in the order of 77 attorneys, representing the victims and their families, have participated in this consolidated litigation in San Juan.

Had the proposed rule existed today, it is highly unlikely that this proceeding could have been conducted in the Puerto Rico District Court, since fewer than half of the predominantly tort lawyers from the continental United States who have played a leading role in this litigation would be able to practice in Spanish.

My point is simply that the federal court in Puerto Rico, like federal courts around the country, should remain open to English-speaking lawyers. No Article III federal court in our history has ever had a rule that could effectively disbar most attorneys from the continental United States.

I emphasize that—and I think this is an important point to make about Puerto Rico—that there is a large, sophisticated Spanish-speaking judiciary in Puerto Rico, headed by the seven-member Supreme Court of Puerto Rico. I support and very much admire that institution. But a United States District Court, it seems to me, should never be closed to English-speaking attorneys, since it is a part of an exclusively English-speaking judicial system.

A second reason why I believe this proposal is unwise is that it is very difficult to see how a Spanish trial record could be effectively and timely translated for speedy appellate review in our English-speaking court of appeals.

Various suggestions have been made as to how to do this, and I believe I have studied them all. But I regretfully conclude that the expense and the time involved would seriously undercut the ability of the U.S. courts to function as they are intended, and would threaten the right to a speedy appeal.

We already have the time spent on transcribing the record. To this you would have to add four, five, six, seven, perhaps more, months, to translate the record into English, further delaying the appeal.

It should be realized that a federal court, unlike purely local courts, bases its jurisprudence on the Federal Constitution, the statutes of Congress, the regulations of federal agencies, and the opinions of the various federal courts, including the Supreme Court. None of these materials normally appear in any language other than English.

It would not be easy to conduct federal court proceedings in a different language from English. And once conducted in another language than English, it would be time-consuming and difficult to translate the record into English for appellate review purposes.

It would also be expensive. And the court would be dependent upon extensive financing by Congress. We estimate costs of somewhere between $2 million and $7 million to develop a sophisticated translation section. If, for example, 200 of the 400 appeals that we now have from Puerto Rico were translated, we would anticipate that you would need somewhere approaching 50 translators, full-time, to do this in an expeditious and in a speedy manner. This is based on what we discovered, that the average of a record in a federal appeal is around 700 pages.

Finally, let me point out that in 1987, the Southern District of Texas reported 9,464 instances in which a Spanish-language interpreter was used in a judicial proceeding. That is four times more the use of Spanish interpreters than occurred in the District of Puerto Rico in the same period.

Actually, there are seven federal districts besides Puerto Rico that report greater utilization of Spanish interpreters. I mention these figures, because if the option proposed is granted in the District of Puerto Rico, the obvious question arises whether the Congress can justifiably refuse a Spanish option in these other district courts around the country, where there are actually more people who desire to use Spanish.

May I close by emphasizing that I understand and sympathize with the desire to use one's own language, but the present system, utilizing interpreters for non-English speakers, works, perhaps not perfectly, but it has worked adequately. And there is perhaps no perfect solution when two languages are involved.

And one must balance whatever advantages the proposal might afford to some litigants against the impact the required use of

Spanish will have upon the ability of the Federal courts to administer justice.

The federal court has had a long association with Puerto Rico. We hope to continue that association, should the people of Puerto Rico so desire. But like all institutions, the federal court has a certain form and structure, and doubtless, certain limitations as well as strengths.

We are not infinitely malleable. If the time comes that the people of Puerto Rico feel that their interests diverge so greatly from the United States that an English-speaking federal court in ordinary form is no longer wanted, I suppose another option would be to give consideration to the possibility of not having a federal court in Puerto Rico.

That, rather than reengineering the federal court, so that it is greatly different from federal courts elsewhere, might be a preferable consideration.

That ends my comments.

[The prepared statement of Judge Campbell follows:]

STATEMENT

OF

HONORABLE LEVIN H. CAMPBELL

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

BEFORE THE

COMMITTEE ON ENERGY AND NATURAL RESOURCES

UNITED STATES SENATE

My name is Levin Campbell. I am the Chief Judge of the United States Court of Appeals for the First Circuit. I appreciate the opportunity to appear before this Committee to testify on the proposed Puerto Rico status legislation as it affects the federal courts and, in particular, the proposed use of the Spanish language in the United States District Court for the District of Puerto Rico. The District Court for the District of Puerto Rico is one of the five trial courts that make up the First Circuit. Having sat regularly in Puerto Rico for over 15 years, I have obtained considerable familiarity with the functioning of the federal courts there. For this reason, I believe my views and testimony may possibly be helpful to the Committee.

I am not here to speak about the broad policy issues of bilingualism, whether in Puerto Rico or elsewhere. Instead, I wish here to discuss the pragmatic issues that must be considered before opening up what I believe could be a chaotic new chapter in our federal judiciary.

I am not unsympathetic to the concerns that have led some excellent people to believe that a bilingual federal district court in Puerto Rico is desirable. Spanish, after all, is the native language of Puerto Rico; it is the only tongue permitted in its large local court system. There are, however, practical implications for the federal judiciary, a national not a local system, that must be raised and fully understood if we are to have responsible legislation in this area. My comments will, hopefully, explain some of those practical concerns, especially as they relate to the appellate process.

As you know, the issue of the use of Spanish in the District Court in Puerto Rico has been considered by Congress before. The 95th and 96th Congresses both considered bills that would have allowed the use of Spanish in the District of Puerto Rico in certain limited circumstances. Today's proposals are much broader. The current proposals would give a single party in any case the right to require that all proceedings in that case be conducted in Spanish. This is the first time that such far reaching legislation has been suggested. All previous bills limited the use of Spanish language proceedings to criminal cases and civil cases in which all parties consented. The previous bills also contained language allowing the presiding judge, in his discretion, to waive the use of Spanish where special considerations made its use impracticable.

The scope of the present proposal is so broad that it could result in significant injustice to litigants and attorneys alike. Under the present proposal one party in a large complex multi-party civil case or a large multi-defendant criminal case could successfully demand that the entire proceedings be conducted in Spanish even if that party or defendant was the only person in the case who spoke Spanish. While it might be said that this is no less fair than today's requirement that English be spoken at a trial involving predominantly Spanish-speaking parties, there is this difference: the federal district court is part of an exclusively English-speaking system in which the use of any language but English poses a number of major problems.

One such problem is how to translate the Spanish language record for appellate review in a higher federal court, presently my court, the Court of Appeals for the First Circuit. I shall discuss the appellate problems created by having a Spanish trial record later in my remarks. Another problem is that the use of Spanish will curtail the right of non-consenting parties to employ as trial counsel non-Spanish-speaking lawyers.

Let me focus first on this latter issue. If any one party can dictate that the trial in the District Court for the District of Puerto Rico be held in Spanish, the other parties will lose the option of employing attorneys who speak only English. As most attorneys throughout our nation fall into this category, the parties will be precluded from employing in this particular federal tribunal most members of the bar practicing in the United States, including most of the leading practitioners in typical federal law cases such as patents, copyrights, tax, anti-trust, etc. National corporations or individual plaintiffs or defendants doing business in Puerto Rico could no longer use their regular stateside counsel in Puerto Rico federal court. Federal agencies, which today are often represented in Puerto Rico by English-speaking attorneys from the Justice Department, would have to find Spanish-speaking substitutes. Thus, the federal government would be effectively precluded in a major tax case from sending an experienced Tax Division lawyer from Washington to handle the trial. Similarly, federal prosecutors from the Justice Department could never, as in the past, be deployed in Puerto Rico cases. The Puerto Rico District Court would be the first United States court in history where English-speaking attorneys, including those of the federal government itself, could effectively be barred from practice at the option of any party. This could create the appearance of local favoritism toward Puerto Rico based attorneys, which would be especially worrisome in light of the numerous Supreme Court cases prohibiting such favoritism.

Conversely, allowing Spanish language proceedings in a federal court would have an unfortunate side effect by encouraging practice at the federal bar of attorneys whose English is inadequate for responsible federal practice. Whatever language may be spoken in court, I would question the ability of an attorney who is not fluent in English to practice in the federal court system, since most of the basic legal materials, including rules, statutes, regulations, and guiding precedents, are available solely in the English language. How could any attorney adequately represent a client in federal court if that attorney is unable to comprehend the nuances of federal laws and statutes, rules of practice, Supreme Court opinions, and the like? Congressional statutes and legislative records are not published in any language but English, to my knowledge. The same is true as to Supreme Court and other precedents. To be sure, most lawyers in Puerto Rico have some knowledge of English. But I observe a vast degree of difference between the fluency needed to analyze legal materials and that possessed by one who uses English only occasionally. Puerto Rican lawyers who practice today in the federal district court are indeed fluent in English. I fear that their predominantly Spanish-speaking successors may not be.

I guess what I am expressing is the fear that if Spanish becomes an official language in the federal court in Puerto Rico, the District of Puerto Rico will tend to become an isolated enclave in what is and has always been a unified federal court system. Instead of improving the quality of justice for the residents of Puerto Rico, this isolation could have precisely the reverse effect, as the district court in Puerto Rico loses its essential links to a great national justice system.

It is extremely important to remember that the federal courts are a unified system with national rules of procedure and a national policy-making body, the United States Judicial Conference headed by the Chief Justice of the United States. These courts are not just an amalgamation of independent district and appellate tribunals. While each district court has local aspects, it is a United States court, gaining much of its strength and consistency from that identification. A host of foreign-speaking litigants have passed through our unified court system in the last 200 years. I would like to think that they, together with the Spanish-speaking people of Puerto Rico, have received the same access to justice and due process as their English-speaking neighbors.

A change in the rules for one district in a court system which links 94 district courts, 13 courts of appeals and the Supreme

Court will have serious repercussions throughout the system. Although the District of Puerto Rico is unique in that the official language of the Commonwealth is Spanish, there are many other judicial districts in the United States with large Spanish-speaking populations. It is interesting to note that in 1987, the last year for which figures are available, seven district courts reported a higher use of Spanish interpreters than did the District of Puerto Rico. Those districts were, in descending order of usage, Southern District of Texas, Southern District of California, Western District of Texas, Southern District of Florida, District of Arizona, Eastern District of New York, and Southern District of New York. In 1987, the Southern District of Texas reported 9,464 instances in which a Spanish language interpreter was used in a judicial proceeding, while the District of Puerto Rico reported 2,113 such instances. If we provide a Spanish language option in the District of Puerto Rico, can we justify not providing the same option in the Southern District of Texas or any of the other districts mentioned above? The argument has been made that Spanish-speaking people in Puerto Rico are denied due process because proceedings in the district court are held in English. If Congress believes that the use of an interpreter does not sufficiently guarantee due process, then this becomes a national issue affecting all non-English-speaking citizens.

Let me turn next to the effect of Spanish upon the right to appeal. Being a circuit judge, I am naturally concerned with the right to appeal. The right of appeal is one of the fundamental rights upon which the United States judicial system was founded. Not only does it ensure a second look at the fairness of a particular outcome, the right to appeal also helps assure that the law applied in each district court will be uniform and in accordance with national and constitutional standards. This rignt is jeopardized whenever the cost of an appeal becomes prohibitive or the delay in bringing an appeal before the court is such that justice is not served.

If the use of Spanish is permitted in the District Court in Puerto Rico, whenever an appeal is taken from a Spanish language proceeding, the original Spanish record will remain in the District Court until the stenotype tape is transcribed and translated.[1] This will slow down not only the processing of appeals from final judgments, but perhaps more importantly, it will dramatically affect the handling of interlocutory appeals and appeals involving emergency matters. A court of appeals is not infrequently called upon to hear an emergency motion or grant a stay of a district court case. The appellate court must respond in a timely manner so that the district court proceeding is not hampered. I can remember cases, for example, where major governmental functions have been enjoined by a district court order or where people have been jailed for contempt. If an emergency motion or stay is filed in the court of appeals from a Spanish language proceeding in the

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1. I discuss below the alternative of simultaneous translation. I am assuming, for reasons I shall mention, that it is unlikely that all transcripts of Spanish language proceedings will be translated into English at the very same time they occur.

district court the applicable portions of the record will have to be translated before the court of appeals can review the matter and issue a ruling. Furthermore, in the event the attorney in the district court proceeding is not bilingual, the litigant will have to change counsel on appeal. Not only is this likely to be a time consuming process, it could also conflict with the goal of the court to promote consistency throughout the judicial process.

The translation process that seems most likely to be used to translate the district court proceedings would involve the transcription of the stenotype tape into Spanish and then translation of the transcript into English. Before the translation can begin, the court reporter must transcribe the record. Pursuant to the Court Reporter Act, the transcript should be provided to the court of appeals within 30 days after the filing of the notice of appeal. Although a large number of transcripts are received in the clerk's office within the allotted time period, it is not at all unusual for transcripts to take 60 days or much longer to be filed in the clerk's office.

The last time that I appeared to discuss this issue, we undertook a random sampling of cases on file in our clerk's office in order to determine the length of an average record. That random sampling revealed that an average record contains approximately 700 pages of pleadings, exhibits and transcripts. Assuming a translation speed of ten pages per day, the average record would be delayed at least an additional 70 working days (three months) because of the translation. Taken together, the delay caused by the transcription and the translation of the record will be a minimum of 100 days (4.5 months). Again, this figure reflects the delay for an average record on appeal under optimum conditions. Many records are voluminous and are delivered to the clerk's office in boxes. These records may take up to one year or more to transcribe and translate.

Simultaneous translation has been suggested as a way of reducing the delay in the appellate process. One method of simultaneous translation involves the interpreter speaking into a face mask which contains a recording device. The interpreter dictates the proceedings which are taking place in Spanish into English. The dictation is then transcribed and becomes the record on appeal. This system, however, has a number of flaws. First, unless a Spanish transcript is also prepared at the same time, by means of a Spanish-speaking reporter or, possibly, a tape recording that is later transcribed, there will be no control over the accuracy of the English version. Serious mistranslations could occur without remedy. Second, under this system the interpreter would have to be relieved on a regular basis due to the exhausting nature of the work, which would make the system extremely costly. Third, I am told that it is not easy to find persons who can simultaneously translate with the fluency and great accuracy required for legal proceedings. The ability to translate simultaneously is a talent that only some people can develop. Such people are not easy to locate and employ, and, when found, they are not cheap.

The second approach would be to employ court reporters who could listen to testimony in Spanish and simultaneously prepare a stenotype tape in English. This approach would also not provide for a Spanish language tape of the proceedings, hence opening the door to serious, irremediable errors. In addition, it is questionable whether people with these skills exist. Although there are court reporters who are fluent in both English and Spanish, they usually learn stenotype techniques in one language or the other, not both.

Whatever system is used, it seems certain that simultaneous translation is an expensive proposition. Assuming the court could locate and attract people with the necessary skills, the salary structure would have to match their worth in the marketplace. It is also important to remember that only a fraction of the cases tried are ever appealed. In the District of Puerto Rico, only one out of every seven terminations is appealed. Therefore, the use of simultaneous translation (as opposed to translating records after an appeal is taken) would result in the needless translation of six out of every seven records. For all these reasons, I doubt that simultaneous translation is a likely course.[2]

The effect of legislation on the number of district court cases that would be conducted in Spanish, and the number of appeals from Spanish language proceedings are virtually unknown. At this time we cannot project, with any degree of confidence, the impact of Spanish language proceedings on the court of appeals because it is unclear how many litigants would choose Spanish and how many of these cases would be appealed.

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[2] Optimistic projections as to the ease of handling these translation problems should be examined carefully. Law and legal materials are exacting matters linguistically: translation at a professional level, such as federal litigants have a right to expect, requires far more than ordinary conversational skills.

We have prepared the attached cost estimates to show the projected first year costs for initiating a Spanish language option in the District Court of Puerto Rico at five different levels of activity. The basis for the projections is the actual number of appeals filed in the First Circuit Court of Appeals from the District of Puerto Rico during 1988. Since 1979, the court of appeals has experienced a 211 percent increase in the number of appeals filed from the District of Puerto Rico, from 127 in 1979 to 395 in 1988. Even without legislation, this trend toward a higher level of filings from the District of Puerto Rico is expected to continue.

Using the assumptions stated earlier (the average record contains 700 pages of transcript and the average translation speed is ten pages per day) the projected first year costs range from a high of $8,220,853 to a low of $1,639,763. The high cost assumes that all 395 appeals filed originated from Spanish language proceedings and the low cost assumes that 20 percent of all appeals filed originated from Spanish language proceedings. The number of translators and secretaries that would be needed to run this system would range from a low of 25 translators and three secretaries to a high of 126 translators and 16 secretaries. A realistic estimate of the first year cost would probably be about $4,000,000. Our inability to more accurately pinpoint the number of appeals that will require translation emphasizes the lack of available information.

These costs are very conservative because they do not take into account the cost of space. The facilities at Hato Ray, which the District Court is scheduled to move into later this year, clearly do not have sufficient space to provide the necessary accommodations for the very large number of translators and secretarial staff that would have to be hired if the legislation is enacted.

There are several other factors that I believe bear mentioning in connection with this issue. First, if Spanish language proceedings become commonplace in the District Court in Puerto Rico, that court will be severely restricted in its ability to utilize the services of visiting judges and may also be able to receive less administrative assistance and technical oversight from the Administrative Office of the United States Courts and the Federal Judicial Center to the extent Spanish rather than English becomes the predominant mode of expression. Second, in considering whether the Spanish language option is necessary, it should be remembered that the United States District Court in Puerto Rico is not the only court in Puerto Rico. It does not exercise jurisdiction over strictly local controversies as do Article I territorial courts that exist in the United States Virgin Islands and other territories. Local jurisdiction in Puerto Rico, as in the states, is exercised by a commonwealth court system that is many times larger than the federal court in Puerto Rico. This is a sophisticated court system with 94 courts of limited jurisdiction, a superior court (court of general jurisdiction) and a Supreme Court (court of last resort). A total of 255 judges and eight Supreme Court justices are involved (as compared with only seven federal district judges and two bankruptcy judges in the District of Puerto Rico). As the commonwealth courts conduct business exclusively in Spanish, Puerto Rico residents already have the benefits of a Spanish-speaking judiciary for most cases in which they become involved.

Should Congress nonetheless wish to allow proceedings in the District Court of Puerto Rico to be conducted in Spanish, I would suggest to the Committee that this proposal should not be contained in the same legislation that will control the future status of the Commonwealth of Puerto Rico. My concern here is that if, at some point in time, the Spanish language option as presently worded is found to be unworkable, it will be virtually impossible to repeal or amend given its inclusion in the legislation establishing the status of Puerto Rico.

Given the magnitude of the proposal, if any legislation is to be passed in this area, I believe it should be structured to enable the District of Puerto Rico to initiate a three-year pilot project. If a pilot project is not agreeable to the Committee, let me suggest that, at least initially, only criminal cases be included in the program. Even this will result in a significant number of appeals from Spanish language proceedings. The number of criminal cases filed in the District Court of Puerto Rico increased 141 percent between 1979 and 1988. During the same period of time, the number of criminal appeals filed from the District of Puerto Rico increased 673 percent.

A pilot program may even be premature at this time. Perhaps a better solution would be to have the Federal Judicial Center undertake a comprehensive study to determine the impact of this legislation on the district and appellate courts. If conflict of interest is an issue, Congress could appropriate the necessary funds to contract with a consulting firm or research organization to study the issue.

Let me end by again thanking the Committee for allowing me to present my views. I have circulated these comments to all the active and senior judges of the Court of Appeals for the First Circuit; all have expressed agreement with them. I have not discussed the other facets of the proposed status legislation that bear upon the federal courts. The statements filed with your Committee by Director Mecham on behalf of the federal Judicial Conference reflect the most appropriate commentary on these important matters. I have spoken on the language issue only because I believe my experience as a judge of the First Circuit may provide some assistance. May I emphasize that I, of course, take no position on the larger status questions. It is up to the Congress and the people of Puerto Rico to determine this. My only interest is in seeing that, so long as the people of Puerto Rico require the services of a federal court, that court be in a position to provide those services properly and with full credit to the judicial system we have the honor to represent. I recognize that the time may come when the people of Puerto Rico may feel that the federal court as we know it no longer fits the needs of Puerto Rico. If that time should ever come, then consideration should be given to dispensing with the federal court in Puerto Rico altogether rather than attempting to restructure it in a manner inconsistent with the remainder of the federal system.

PROJECTED FIRST YEAR COSTS FOR INITIATING A SPANISH LANGUAGE OPTION FOR THE U.S. DISTRICT COURT OF PUERTO RICO

NUMBER OF APPEALS ORIGINATING FROM SPANISH LANGUAGE PROCEEDINGS	NUMBER OF TRANSLATORS	NUMBER OF SECRETARIES	PERSONNEL COMPENSATION (1)	PERSONNEL BENEFITS (2)	START UP COSTS (3)	COST OF WORD PROCESSORS (4)	TOTAL FIRST YEAR COSTS
395 (assumes 100%)	126	16	$5,505,702	$1,541,597	$607,986	$565,568	$8,220,853
316 (assumes 80%)	101	13	$4,422,256	$1,238,232	$486,389	$452,455	$6,599,331
237 (assumes 60%)	75	9	$3,257,093	$911,986	$364,791	$339,341	$4,873,211
158 (assumes 40%)	50	6	$2,183,217	$611,301	$243,194	$226,227	$3,263,939
79 (assumes 20%)	25	3	$1,097,697	$307,355	$121,597	$113,114	$1,639,763

1) Translator positions are graded at JSP 10, JSP 12 and JSP 13. 50% of translators will be employed at JSP 13, 25% at JSP 12 and 25% at JSP 10. Secretarial positions are graded at JSP 5, JSP 6 and JSP 8. One to two supervisors will be employed at JSP 8 and the remaining secretaries split between JSP 5 and JSP 6.

2) Personnel benefits account for an additional 28% of compensation costs.

3) Start up cost for each new employee is $4,300 per year and includes such items as furniture and furnishings, general office equipment, telephone systems maintenance and telephone services.

4) Word processors (including printer) cost $4,000 per work station.

The Chairman. Thank you.

STATEMENT OF STEPHEN G. BREYER, CIRCUIT JUDGE, U.S. COURT OF APPEALS, FIRST CIRCUIT, REPRESENTING THE JUDICIAL CONFERENCE OF THE UNITED STATES

Judge Breyer. This is an extraordinarily important legislative effort that you have undertaken, and simply, you have asked us to concentrate on those aspects of this very large bill that pose some problems and that is why it may sound a little negative in tone, because we are picking out, out of this tremendous legislative endeavor, those things that do give us some problems. You want us to focus on the problems, and we will.

Now, when I focus on the problems I will say a few things, possibly of alternatives. But if I say alternatives, I am speaking for myself. That is, the Judicial Conference does not focus on alternatives.

Now, quickly I may focus on four aspects of the bill, but first in light of what you said this morning I should probably read, and that is a problem, and a serious problem that is bothering you is, how do you deal with the disputes that may arise out of the election mechanism? Where are you going to go for that?

I must read to you what the Judicial Conference position is in view of the constant growth of the Federal docket and the increase in the number of lower court judges whose decisions come before the Supreme Court for review, the Supreme Court's workload is growing to such an extent that it could not accommodate the proposed mandatory jurisdiction.

Chief Justice Rehnquist has authorized me to inform you that he emphatically agrees with this position. That is the position of the Conference. Now, I will add on my own that there are lots of instances in the past history where special courts have been set up for special circumstances.

The Chairman. You mean, on the certification of the election question?

Judge Breyer. Yes. I think reading your letter to the Conference, which I did, and then reading the reply, I think the letter is open to the interpretation that there could be lots of different suits that arise.

Person A could have this problem with the certification. Person B could have some other problem. We have sat in some election cases in the First Circuit out of Puerto Rico and there are lots of different problems that theoretically may arise.

So it is conceivable somebody would read this and think, my goodness there could be quite a few cases growing out of this. We do not know in advance whether there will be one case, zero cases or a lot, but I could understand why the Supreme Court might think, when we can decide 150 cases a year maximum, it is not a good idea to have the Supreme Court in the first instance decide 50 or 100 more, or three more, or five more, or whatever it is.

So I think that is the how I understand that and I point out on my own, there have been special railway courts, special price control courts. There is a special emergency court of appeals. All of those drawing on the manpower of the Federal judiciary. They are not new appointments or anything, but taking a judge from Nebraska, a judge from Maine or whatever and making a special panel.

There are lots of, obviously, alternatives between taking the Supreme Court of the United States and taking the present sitting Federal District Court in Massachusetts. You have a wide range of alternatives. That is the first point.

The second point is, if I turn to the bill for a minute, is in subpart 15 you have judiciary, and there, the first thing there in part 1 is that you have a provision which you have discussed—I have read your discussion of that, which is I think a very good discussion. It says, "the district court shall not undertake to construe a heretofore unconstrued Puerto Rico statute or regulation or decide a heretofore undecided point of substantive law."

Now, as a statement—as a hortatory statement of what ought to be done, I couldn't agree with it more. However—however, if you write a mandate like that into the law, as I think you pointed out with an interesting colloquy which I thought absolutely right, that suddenly you are going to introduce the question of whether or not that particular sentence has been complied with.

So someone will argue on an appeal, the district court did not comply with that sentence. We will then have to decide whether they complied with that sentence. The remedy will be to send it back to the district court.

Now, even leaving that problem aside, we typically take nine—we looked it up, actually. A typical appeal in the First Circuit takes nine months and ten days. Now, we certify to the Supreme Court of Puerto Rico if we think there is a significant issue. That is our normal practice.

I looked up how long that took. The certification typically takes, on average the last five years, an additional one year and three months. So you are changing a nine month decision-making process into a two year decision-making process.

Now, I would like to add that if we certified to other courts, which we do—New Hampshire, Massachusetts, some other ones—it is not that Puerto Rico is slow. They do brilliantly. The problem is that the certification process itself takes time.

Now, you suddenly introduce a mandate like this and I'll tell you the kinds of things that come up. I mean, we have a case which says, res judicata. The fellow sued in Puerto Rico. He got thrown out. It goes into the Federal court. Res judicata.

But there's an exception in res judicata, under Puerto Rican law, for when it is in the interests of justice. So they argue, it is in the interest of justice. Now, there is no problem deciding that case, if you look for the actual case. We know what the Supreme Court of Puerto Rico would say and we can decide it and no one has ever criticized our decision in that case.

But if you had to ask me, was it heretofore construed or unconstrued, I might have to say no, to be honest about it. It was not heretofore construed or unconstrued in Puerto Rico. Do you see the problem?

We have university regulations all the time. The university regulations come up. Well, we interpret can they fire this particular person? Do you have to give a person tenure when the appointments committee says give them tenure but the Provost does not want to? They will interpret those regulations precisely the same way that every other university does, but if you asked me, did they ever construe that regulation before? No, to be honest.

Do you see the kinds of problems, the practical problems? That is why I say, if this is hortatory, sure, of course we should do it and I hope that we do do it and frankly, I have not heard people say we have not been doing it. However, you translate it into a formal part of the bill, I see a problem. All right. So that is the second part.

Now, the third part. The third part where I see a problem is if you go down into part 3—I am skipping the language. All right, look at part 3. This says that any issue of law arising under the Puerto Rico Federal Relations Act and any action or controversy brought in the Federal court shall be certified to the District of Columbia Court of Appeals.

Then, in addition, the Commonwealth of Puerto Rico, its department officials, can transfer any action brought against them in the District Court of Puerto Rico up here to the District of Columbia.

Now, I am posing to you the practical problems that that will pose. Consider three cases. A sues B in the Puerto Rico District Court. Normal case: heard in the Puerto Rico District Court, appealed to us up in Boston.

Case 2: A sues B. B is a government official. What kind of suit? Well, there are dozens. A handicapped person under education for the handicapped. A person who feels the police have beat him up. A person who feels that his civil rights have been infringed.

All right, he is suing the government. Same kind of a case, except this time he feels his civil rights have been infringed. The government can go have him travel 1,000 miles up to Washington, D.C. to a district court here. That can be a hardship and you should say, why?

Case Number 3: A sues B, and this time directly or indirectly there is in this case some issue about the Federal Relations Act. Now, believe me, a good lawyer can put an issue about the Federal Relations Act into almost any case.

Now, tried out in the District of Puerto Rico, appealed to us, suddenly what we are supposed to do is, we are supposed to stop everything, certify the Federal Relations Act question down to the District of Columbia, have them decide it and get it back.

Well, say I have never heard of one circuit court of appeals certifying a legal question to another circuit court of appeals, and even were that precedent irrelevant I would still say, look at the time delay you are going to have. Because when I told you a certification takes a year and three months extra in Puerto Rico, it was not because Puerto Rico was unusual.

Then consider the added problem we always have, how do we write the question? You can write the question and then you write it in such a way the answer comes back, you think my God, after you get the answer, I should have written it differently. Two years and six months. Three years and nine. Do you see the kinds of problem that that can create?

Add to it the difficulty of somebody, say, strategically wants to delay a case and so they put an issue in. I am simply trying to, a little bit impressionistically give you an idea of the practical problems that would cause.

All right, the fourth issue—and here, I—the others are quite strong. This is really a very difficult issue, I think. This issue comes up in another part of the bill which is subpart 4, and it is very much at the heart of the question. What happens—as I understand the bill, what happens when Congress passes a law that might or might not apply to the commonwealth?

They presently have a provision that talks about local inapplicable—I had to write an opinion about what the history of that word was. It is very interesting. It comes from Henry Clay. I mean, it is fantastically interesting and your predecessors in this body—it all had to do with slavery, actually. But the interpretation of that word is not an easy matter.

Now, what you are adding to the interpretation of that word is the following. You are saying here, if Congress says the law applies to Puerto Rico, it does. Fine. If Congress says it does not, it does not. Fine. What happens when Congress is silent?

Well, the issue then under this bill is thrown to a court to decide under a standard, if I understand the bill correctly, under a standard of whether it is consistent with the basic culture; with the basic need for autonomy; with the basic kinds of important general principles; where a risk is, since they are rather abstract, if you ask seven courts you will get seven different answers. You see? Highly abstract.

I am focusing your attention on the kind of a legal decision you are asking us in this bill to make, and therefore I say, with some respect, might you think perhaps of a different body, an administrative body that might make this decision? A different way of making the decision, rather than asking a court to decide whether or not a statute of Congress is applicable or inapplicable under a standard such as the general—you know, the standard that is in subpart 3.

Those are the four main points, because you have asked us to point out some of the difficulties, and those are the main difficulties along with Judge Campbell's.

The CHAIRMAN. Thank you very much, Judge Breyer. First of all, you use the word "autonomy." How does autonomy differ from independence?

Judge BREYER. I feel that any language that I use on that kind of an issue is open to all sorts of interpretation, so I would say that just happened to be a word that came into my mind. I am trying to leave aside the question of status.

The CHAIRMAN. The two can be used synonymously?

Judge BREYER. I think that is true.

The CHAIRMAN. On this question, I certainly agree with what you said about most of this. The way we have done this bill, in S.912 we have put in, "Commonwealth defined as follows," blank, as well as the other statuses and asked the parties to put in their wish list, which is not just a wish list but it is a first cut at the question and we recognize that these are going to be in some cases unworkable.

In some instances we are going to have to examine and modify, but they are provocative issues. This issue of Spanish in the courts is a difficult one. I began my own practice as a prosecutor and defense counsel in Judge Advocate cases in Germany, where we would use frequently interpreters. Ours was, I think a fairly successful experience. I thought that interpreters could give justice even in criminal cases.

Have either one of you been assigned down to the district court in Puerto Rico, actually trying cases?

Judge **Breyer**. No.

The **Chairman**. Have you talked to your colleagues who have?

Judge **Campbell**. Many times.

The **Chairman**. Do they think that the justice has successfully administered in both criminal cases and civil cases, using interpreters?

Judge **Campbell**. I think you will find that the Puerto Rico district judges currently believe that, and Judge Toruella, who is from Puerto Rico, who is on the Court of Appeals for the First Circuit, who has I believe filed a separate statement with you also argues from experience—he was in the district court for a long time before—that the system does work. It is not perfect, but it seems to me you have an inherent problem when you have two different languages and it is hard to achieve a perfect——

The **Chairman**. He testified in San Juan, at our hearings in San Juan. It is my inclination, with the concurrence of Senator McClure on this question of interpreters and Spanish language, to submit a separate bill, separate from this legislation, to let it be considered in the Judiciary Committee, which has the expertise, and to be able to go into this matter in more detail.

It seems to me it is not absolutely central to this legislation and it is a tough question and I do not think that commonwealth can say, you have to have the Spanish language in trials in order to enhance commonwealth properly. I hope that is their attitude, and putting it in a bill and letting it be litigated in, the Judiciary Committee would be—since they do have jurisdiction, after all—would be the better way to do this.

Judge **Breyer**. Obviously in a criminal case, if you have half the people who do not speak English, you limit the grand jury and the jury selections, and obviously it is tough sometimes if there might be a jury of people who do not understand fully the English, but maybe think they understand it well enough.

I think a lot of what we have said is, if you are going to try to cure that problem the worst conceivable thing would be just to say, we are going to cure it and then not provide the resources necessary to do the job. I mean, if you have simultaneous translators in criminal cases and actually get the records prepared and actually get the appeals done on time, then you will not work the injustice.

But if in fact you do promise that everyone can speak Spanish and then the appeals are not done on time and the transcripts are not there and the translation is not provided, then I think there is a risk that you will create more injustice than you cure.

The **Chairman**. I do not want to speak for the commonwealth group at this time, but I suspect they would be willing to let us introduce a bill—or me, if Senator McClure is not of the same mind—and let it go to the Judiciary Committee and take it out of this legislation. I think it is inarguable what you have said about—irrefutable what you have said about the other provisions there.

You know, holding off on issues of law. I mean, it is a nonending matter.

Senator **McClure**. Mr. Chairman, will you yield at that point?

The **Chairman**. Certainly.

Senator **McClure**. It seems to me that the issue of the language to be employed in a court system is identical under commonwealth status or under statehood. It is an administration of justice issue more than it is a status issue, and I make that statement now because I would invite those who are protagonists from one point of view or the other to either agree or disagree, and we appreciate hearing from them. But it appears to me that indeed it is not central to the issues in this bill before us today.

The **Chairman**. That is right. Whatever ought to be done ought to be done either under statehood or under commonwealth.

One further question, Judge Breyer. On this question of the jurisdiction of the Supreme Court, what I had in mind in my questioning was on the narrow question of certification of the election.

Now, it may involve a multitude of violations. I mean, you may have ten different lawsuits involving 100 different violations of different laws under which you allege that they stole votes, that they stuffed ballots, that they counted absentee ballots, that they let underage people vote, that they double counted, that they voted people in graveyards—a whole long list of things.

But they all lead to the question of, the election was valid or invalid. That A won instead of B, or whatever. So it is a narrow question—yes or no, or do you redo the election? Whatever.

Now, that is different from an injunction, or during the election to stop a particular practice or to declare certain groups of people ineligible under the law to vote, or to get an injunction against spending money in a certain illegal way. Those are a whole other set of election issues.

But it seems to me, in an issue as important as the status of Puerto Rico, that it ought to be decided by the highest court at the earliest time. Since under S.912 this would be self-executing—or, it is S.712, it would be self-executing, we should not wait for this matter to leisurely matriculate its way through the courts.

The Supreme Court does not have to convene all nine justices. It can appoint a master. It could appoint you, or anyone to hear the actual evidence and I am sure that where the issue is the narrow one of certification of the election, that all cases would be consolidated.

They would have to be, because you could not have one judgment in one case that said yes, and in another that said no, where jurisdiction is in the same court. It has got to all be consolidated in one case. Now surely, that would not overburden the Supreme Court, given that the matter would come to the Supreme Court anyway, would it?

Judge **Breyer**. I cannot speak officially, but as I read the letter, the letter asked, what about giving jurisdiction to the Supreme Court over procedural or process issues arising prior to or immediately following the referendum? I could see where one might have thought you had in mind a lot of cases, when what you are thinking of is something that funnels up to the court quickly and ends up in one case.

It seems to me it should be possible, between the staff in the administrative office and so forth and the precedents that we have, with railroad cases, TECA cases, you know, to work out a speedy system for getting the thing finally resolved with an eventual yes or no. I mean, it should be possible to work out, is my initial reaction. But I cannot speak officially for the conference on that.

The **Chairman**. How about jurisdiction in the First Circuit for all matters other than the certification of the election?

Judge **Breyer**. It depends on what your political problems are. It is really a function of what will provide the most security; that you are getting a completely, you know——

The **Chairman**. Let me explain what the political problems are. You may or may not have heard, there has been an expressed feeling that certain judges in certain courts have a partisan loyalty to one party or the other.

I think the allegation is that judges in state courts go one way and Federal courts go another way. There may be absolutely nothing to that, but if there is that allegation or that appearance to the people, we can easily fix that, it seems to me, on this most important issue by providing jurisdiction elsewhere without for one second giving any truth to the allegations. We are not worried about the truth of the allegations, and we would rather, frankly, hurt somebody's feelings than have a bad election.

So could you help us? Could you suggest how we might design a system? Maybe jurisdiction of the Supreme Court for the narrow question of certification and then all of those other cases, first of all I think we want observers, probably, under the Voting Rights Act, which is usually discretionary, I think, that we would want to provide for them.

Not, again, because—that we have any reason to suspect that the present law would not work very well, but because some people say it would not, and if they say it would not and we can fix it, let us fix it. Let us have a perfect election here.

Judge **Breyer**. Right.

The **Chairman**. Maybe they have jurisdiction for that in the First Circuit.

Judge **Breyer**. The notion of bringing a judge from outside Puerto Rico to sit in Puerto Rico District Court, like Judge Wisdom has sat there, and lots of judges all over the country have sat there, and it has worked pretty well. That is one—and the appeal could channel up to the First Circuit, or elsewhere if you would prefer that.

The **Chairman**. Well, is original jurisdiction in the First Circuit more difficult?

Judge **Campbell**. I was going to say that it might depend upon what the problem was. If it is a problem that calls for a trial or something like that, it is hard for—the Court of Appeals would not normally do that.

It would be a question, if you did not use the existing trial judges in Puerto Rico, of having other district judges, if that is the type of question you are dealing with.

The **Chairman**. Well, how would you deal with that statutorily?

Judge **Campbell**. I think it is something that could be thought about, and I think that we certainly, and I know the Director of the Administrative Office, Mr. Meecham, would be glad to work on the problem with the committee and see if we could be helpful. It is a little hard to come up with anything except ideas that you might later decide were—seemed good at first but were not very good when you thought of it the second time around, on the spur of the moment.

The **Chairman**. Well, you could be most helpful to us on that, but we must act with great speed, because we want to have our first draft out—we want to report legislation this month. Now, obviously, the work of this committee will not be final. It will matriculate through other committees, unfortunately. We think we ought to run the whole Congress.

Judge **Campbell**. I am sure that we would give all the help we could in terms of suggestions as to——

The **Chairman**. Well, let me solicit that you give us something on that. I ask that you do that as soon as you can. We would very much appreciate it. That would be a great help to the committee. Senator McClure.

Senator **McClure**. Thank you very much, Mr. Chairman.

As I understand it, we have a request from the District Court in Puerto Rico to make a court resolution a matter of record. I think that court resolution is dated June 30, 1989. I think that it has been communicated to you. I know it has been to me. And I would ask unanimous consent that that court resolution, together with certification, be made a part of the record.

The **Chairman**. Without objection.

[The information referred to follows:]

CERTIFIED COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

IN THE MATTER OF:

REQUIRING THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF PUERTO RICO TO CONDUCT JUDICIAL
PROCEEDINGS IN THE SPANISH LANGUAGE.

Misc. 89-082 (HL)

RESOLUTION

WHEREAS: Paragraph (b) of Subpart 5, Section 11 of S. 711 contemplates that Congress enact legislation requiring the United States District Court for the District of Puerto Rico to conduct proceedings in the Spanish language, upon request of any party to the proceedings; and

WHEREAS: The concept of providing a bilingual option, although seductive at first blush in a District where Spanish is the predominant language, has far reaching implications when examined in light of due process, budgetary considerations, and workability; and

WHEREAS: The Judicial Conference of the United States adopted the following resolution at its meeting on March 7-9, 1979:

> RESOLVED: The Conference takes no position concerning the policy implications of proposed legislation which would authorize the use of Spanish in the United States District Court for the District of Puerto Rico. However, the Conference opposes the enactment by Congress of a bill similar to H.R. 13950, introduced in the 95th Congress, unless proper consideration is given to the following practical effects of this legislation which would have an adverse impact on the administration of justice, both as to trials in the United States District Court of Puerto Rico and as to appeals from such court to the First Circuit:
>
> 1. The problem of adapting an English-speaking federal court system based on interpretations of cases and statutes

written in the English language to cases involving Spanish-speaking defendants;

2. Greatly increased expenses, including costs required for additional equipment, space and personnel;

3. Delays in both trials and appeals;

4. Difficulties in obtaining Spanish-speaking reporters, translators and other necessary personnel' and

5. Difficultie arising from delays in the immediate review by the Court of Appeals of stays and emergency orders;

and

WHEREAS: It is our strong belief that the introduction of a Spanish language option in the federal district court in Puerto Rico will cause the court to become an isolated entity in an otherwise unified federal system in that it would (1) limit the ability of non-Spanish speaking members of the federal bar in Puerto Rico and elsewhere from practicing in the District Court of Puerto Rico, (2) encourage the appearance at the federal bar of attorneys whose English is inadequate for responsible federal practice, and (3) cause a diminution in the quality of justice and the access to justice available to the people of Puerto Rico; and

WHEREAS: We have been informed that the first year cost of instituting a Spanish language option in the federal district court in Puerto Rico would most likely range from $3 million to $4 million and could exceed $8 million if, at the current rate of appeal, all appeals to the First Circuit from the District of Puerto Rico are from Spanish language proceedings; and

WHEREAS: We have been informed that the institution of a Spanish language option would require locating, hiring and training between 25 and 126 full-time translators, at a recurring yearly cost ranging from $2.5 million to $3.25 million and increasing to as much as $7 million, depending on the rate of appeals from Spanish language proceedings; and

WHEREAS: It is highly unlikely that the court would be able to locate the necessary number of qualified translators; and

WHEREAS: The added cost would come at a time when the judiciary is attempting to function at a funding level substantially below its requirements; and

WHEREAS: The current budget constraints make such an expenditure difficult to justify and in the absence of such an expenditure, litigants in Puerto Rico would become second class citizens in that they would be forced to litigate in a district court lacking proper appellate review and subjection; and

WHEREAS: We have been informed that the difficulty in the processing of Spanish language appeals would result in at least a 4.5 month delay in processing of an average Spanish language appeal. (We believe that appellate delay would be very serious under such a system, and we believe, further,that such delay would result in substantial injustice); and

WHEREAS: It has long been accepted and indeed noted in case law that the U.S. District Court for the District of Puerto Rico is not a local court of Puerto Rico, but is an Article III court:

> Indeed, it is difficult to conceive how this
> court could remain a viable part of the federal

> system if proceedings here were conducted in Spanish. U.S. v. Amy Valentine, 288 F.Supp. 957 (D.C.P.R. 1968).
>
> [F]urthermore, considering that this Court is now a Constitutional Court pursuant to Article III, Section 2 of the Constitution, the use of English in its proceedings, and the language qualification requirement of jurors which follow as the logical consequence thereof, is not merely a question of convenience or practicability but is a constitutional imperative ... U.S. v. Ramos Colón, 415 F.Supp. 459,465 (D.C.P.R. 1976);

and

WHEREAS: All seven judges in this District are bilingual. The present system of sequential translation for non-English speaking persons is working admirably well. (Mistranslations are corrected on the spot in open court with the participation of all parties. This process ensures, as simultaneous translation cannot, an accurate translation at no additional cost. In a simultaneous translation, errors, mistranslations--particularly of colloquialisms--may never be corrected properly, because neither the judge nor the lawyers can tell what the simultaneous translator is translating to the other side or to the transcriber. Judicial proceedings, where life, liberty, and property rights are at stake, should not be left to the happenstance of a mistranslation); and

WHEREAS: The financial and practical burdens do not justify any modifications to the present system of sequential translations in open court, it is now

WHEREFORE, resolved that this Court, by unanimous vote of its seven judges, hereby registers its objections to the Spanish language option provision of S. 711.

The Clerk of this Court is hereby instructed to serve a certified copy of this resolution to:

Hon. J. Bennett Johnston, La., Chairman
Committee on Energy and Natural Resources;

Hon. James A. McClure, Idaho,
Ranking Minority Member
Committee on Energy and Natural Resources;
Hon. William H. Rehnquist, Chief Justice, as Chairman of the United States Judicial Conferénce;

Hon. Levin H. Campbell, Chief Judge for the Court of Appeals for the First Circuit;

Mr. L. Ralph Mecham, Director, Administrative Office of the United States Courts.

IT IS SO ORDERED.

At San Juan, Puerto Rico, this 30 day of June, 1989.

Juan M. Pérez Giménez
Chief, United States District Judge

Gilberto Gierbolini

Raymond L. Acosta

Carmen Consuelo Cerezo

Héctor M. Laffitte

Jaime Pieras, Jr.

José A. Fusté

Certified to be a true and full copy
of the original.
JUAN M. MASINI-SOLER, CLERK
U.S. District Court for the
District of Puerto Rico
By: JMasini
~~Deputy~~ Clerk
Date: June 30, 1989

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

June 5, 1989

Honorable J. Bennett Johnston
Chairman, Committee on Energy and
Natural Resources
United States Senate
364 Dirksen Senate Office Building
Washington, D.C. 20510-6150

Dear Mr. Chairman:

In your letter to me of May 15, 1989, you requested comment by the Judicial Conference of the United States concerning S. 710, S. 711, and S. 712, all dealing with the status of Puerto Rico.

Because of the time constraints of the legislative schedule set forth in your letter, this legislation could not be submitted for plenary review by the Conference, which does not meet again until September. It has, however, been reviewed by the Conference Committee on Federal-State Jurisdiction, by the Executive Committee of the Conference, and by the chairmen of the Judicial Improvements and Criminal Law Committees, and this letter reflects their collective views.

At the outset, I note that this legislation raises many policy questions on which it would not be appropriate for the Conference to comment. This letter, therefore, is limited to matters affecting the administration of justice in the federal courts.

FIFTY YEARS OF SERVICE TO THE FEDERAL JUDICIARY
1939 1989

I. Use of the Spanish Language

A. Under Commonwealth Status

The provisions of S. 711 which would apply if Puerto Rico were to vote to continue as a Commonwealth with enhanced status include a commitment to "develop implementing legislation . . . requiring the United States District Court for Puerto Rico to conduct its proceedings in the Spanish language, upon the request of any party to the proceeding." (Subpart 5, 11(b)).

Alternatively, S. 712 would specifically add to the Puerto Rico Federal Relations Act, 48 U.S.C. § 864, the following language:

> (2) The proceedings of the United States District Court for the District of Puerto Rico shall be conducted in the Spanish language upon the request of any party to the proceedings.

(Subpart 15)

The difference between these provisions is that the former would require further implementing legislation while the latter would be self-executing.

As you know, the issue of conducting proceedings in the Federal District Court of Puerto Rico in the Spanish language has been before Congress in the past. The 95th and 96th Congresses both considered bills which would have permitted the use of Spanish under certain limited circumstances. (See H.R. 5563, 96th Cong.; H.R. 13950, 95th Cong.) Both the Senate and the House Judiciary Committees conducted hearings at which representatives of the federal judiciary testified. The Judicial Conference considered one of the bills then pending and at its March 1979 meeting adopted the following resolution:

> RESOLVED: The Conference takes no position concerning the policy implications of proposed legislation which would authorize the use of Spanish in the United States District Court for the District of Puerto Rico. However, the Conference opposes the enactment by Congress of a bill similar to H.R. 13950, introduced in the 95th Congress, unless proper consideration is given to the following practical effects of this legislation which would have an adverse impact on the administration of justice, both as to trials in the United States District Court of Puerto

Rico and as to appeals from such court to the First Circuit:

1. The problem of adapting an English-speaking federal court system based on interpretations of cases and statutes written in the English language to cases involving Spanish-speaking defendants;

2. Greatly increased expenses, including costs required for additional equipment, space and personnel;

3. Delays in both trials and appeals;

4. Difficulties in obtaining Spanish-speaking reporters, translators and other necessary personnel; and

5. Difficulties arising from delays in the immediate review by the court of appeals of stays and emergency orders.

The record of the hearings before the Judiciary Committees, and in particular the testimony of Chief Judge Frank M. Coffin and Judge Levin H. Campbell of the First Circuit Court of Appeals, and Chief Judge Hernan G. Pesquera of the Puerto Rico District Court, explicate at length the administrative and legal complexities and additional costs entailed by such legislation. See, The Use of Spanish in the Federal District Court of Puerto Rico, 1979, Hearings on H.R. 5563 Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives, 96th Cong., 1st Sess. (1979). Rather than extending this letter unduly, I would ask you to refer to those materials for detailed information.

I would like to stress two matters, however. One is that the present bills are more far reaching than the previous bills in that they would for the first time give any party in any case the unqualified right to have proceedings conducted in Spanish. The earlier bills were limited to criminal cases and to civil cases where all parties consented and in addition granted a certain amount of judicial discretion to issue waivers. There is therefore a potential that the bills could produce results that are not consistent with the interests of justice. Consider, for example, the effect of a request by one, perhaps minor party for proceedings in Spanish in a complex multi-party civil case in which many witnesses do not speak Spanish at all; or consider the complications that will arise if one defendant in a multi-defendant criminal case opts for Spanish over the objections of the co-defendants. Consider also the limitations on the choice of counsel because of the necessity for counsel to speak Spanish.

The other is that administrative and financial burdens contemplated at the time of the earlier hearings would now be much more serious as a result of changed conditions in the judicial branch. In the first place, the cost picture has worsened. As you know, any appeal from a Spanish language proceeding would have to be translated; the Puerto Rico District Court is a part of the federal system which is, of course, an English-speaking system. This requires translation not only of the testimony but of pleadings, exhibits and other documents, such as discovery, in the record on appeal. Since 1979 the number of appeals has been increasing as have the costs associated with translation. In 1979, there were 127 appeals to the First Circuit from the District of Puerto Rico. In 1988, that number increased to 395, a 211 percent increase. The staff of the First Circuit conservatively estimates that the costs will range between $3,000,000 and $4,000,000 per year. However, if all appeals are from Spanish language proceedings, the cost could exceed $8 million. To that would have to be added the costs of providing space and support for this effort; there is not now any provision in the federal system for translators. While there may be some partially offsetting savings, these added costs come at a time when the judiciary must cope with funding substantially below its requirements as a result of Gramm-Rudman-Hollings.

All of these added costs would not necessarily fall on the judiciary. But to the extent that they would have to be paid by appealing parties, they could have a significant adverse effect on a party's ability to take_an appeal.

In addition, the caseload picture has worsened. Not only have the pending caseloads increased substantially since 1979 in number and complexity, but the number of trials has also increased by two thirds. As a result the district court is laboring under a growing burden. One consequence has been growing delay in the preparation of transcripts on appeal. By adding a second step in the preparation process, namely the translation of the record, substantial additional time will be consumed in the disposition of appeals.

While delay in any appeal impairs the quality of justice for the litigants, it can be a particular problem in those cases requiring expedited appeals, such as cases involving injunctions or other emergency orders. Although those are not everyday events, they do occur more frequently as the volume of litigation in the courts has increased and continues to increase. At present, in such cases, the Spanish speaking party can follow the proceedings through the use of an interpreter, while an English transcript, needed for appeal, is prepared. Under the legislation, a Spanish transcript would be prepared which would require time-consuming and costly translation into English before an appeal could be heard.

The increased volume of litigation creates other difficulties. One is an anticipated shortage of qualified translators. While many Puerto Ricans speak or understand English as well as Spanish, the translation of litigation records requires the expertise of a trained translator. Even fully bilingual persons without professional training would not be qualified as translators, particularly in the complex and technical cases in the federal courts. It is sometimes suggested that translation of the record could be expedited by use of simultaneous translation. However, simultaneous translators, such as are employed by the United Nations, are highly qualified, specially trained and well paid. It would be difficult for the federal courts to find and pay such persons for all proceedings. Yet if the rights of parties are to be protected, the appellate courts must be assured of translations which will be completely accurate.

Another difficulty is that the use of Spanish in the Puerto Rico District Court will effectively preclude the use of visiting judges, a measure that is from time to time necessary to deal with temporary backlogs or recusals.

Finally, there are strong indications that the availability of Spanish language proceedings in the District Court would cause more cases to be filed there. At a time when the federal judiciary is struggling with its present caseloads, and studies are under way, such as that of the Federal Courts Study Committee, to determine ways in which that load might be contained, this is a factor that deserves serious consideration. Puerto Rico now has and will have its own large court system which provides its residents with access to a Spanish-speaking tribunal capable of dealing with most of their litigation.

Let me reiterate that this letter is not intended to address policy choices implicated in the decision whether proceedings should be conducted in Spanish. Those choices are distinct from the procedural and administrative problems that need to be addressed in the consideration of this legislation. In dealing with those problems, it is well to have in mind that not all of their ramifications can be foreseen at this time and that experience may teach important lessons. The legislation should therefore allow the courts sufficient flexibility to adapt to the needs of parties and the judicial system as they arise.

B. Statehood

S. 712 provides for a statehood alternative under which the state would be entitled to maintain both Spanish and English as its official languages. However, courts of the United States operating in Puerto Rico shall continue to be conducted in the English language as heretofore. (Title II, sec. 17) This alternative would not create a problem.

II. Transfer of Certain Cases

Under the Commonwealth option of S. 712, the Puerto Rico Federal Relations Act would be amended to provide:

> (3) Any issue of law arising under the Puerto Rico Federal Relations Act in any action or controversy brought in federal court shall be certified to the District of Columbia Court of Appeals. In addition, the Commonwealth of Puerto Rico, its departments, agencies and instrumentalities, as well as officials and agents, in both their official and personal capacity, may transfer any action brought against them in the District Court for Puerto Rico to the District Court for the District of Columbia.

(Subpart 15)

The Conference opposes this provision for these reasons:

The language of this section is extremely broad, potentially encompassing numerous actions in which an issue under the Puerto Rico Federal Relations Act may be raised and in addition any action against Puerto Rico or any Commonwealth employee. As a result, a large volume of cases would be transferred to the District Court in the District of Columbia, imposing a heavy additional burden on that court.

The provision for transfer would also greatly burden parties by forcing them to try cases in a distant forum, far removed from where the witnesses, the evidence, the parties and the attorneys are located. This provision conflicts with accepted notions of proper venue. Moreover, it raises serious jurisdictional problems since a party in the District of Puerto Rico may not be subject to jurisdiction in the District of Columbia.

III. Appointment of Judges

The Commonwealth option of S. 712 would require the President to appoint federal officers serving in Puerto Rico subject to Senate confirmation, including judges, "from a list of eligible candidates recommended by the Governor of the Commonwealth of Puerto Rico." (subpart 13)

The appointment power of the President is governed by Article II, Section 2 of the Constitution. The attempted restriction of that power by the above provision may well violate the Constitution. The Conference would therefore recommend against its adoption.

IV. Applicability of Federal Statutes and Regulations to Puerto Rico

The Commonwealth option of both S. 711 and S. 712 would amend the Puerto Rico Federal Relations Act to provide that, except in exceptional situations, "(b) A federal statutory law, or provision of such law, is locally inapplicable unless it is consistent with the policy established under subpart 3 and unless such federal statutory law has proper regard for the economic, cultural, ecological, geographic, demographic and other local conditions of the Commonwealth of Puerto Rico."

A similar provision concerning federal agency regulations would provide, "Any rule . . . issued by an agency . . . shall apply in the Commonwealth of Puerto Rico only to the extent that it is consistent with the policy set forth in Subsection (b)." Other provisions would require federal agencies to evaluate the consistency of any major federal action with the broad policy stated in subsection 3 and to state that evaluation in an accompanying document, and would subject to judicial review an agency's decision to make a rule applicable or inapplicable in Puerto Rico. Because of the broad scope of these provisions, extending to a wide range of federal statutes and agency regulations, they would create considerable uncertainty about the state of the law and are likely to lead to litigation and hence add to the workload of the federal courts.

V. Labor Relations Cases

The Commonwealth option of both S. 711 and S. 712 would assign to the Labor Relations Board of Puerto Rico functions presently delegated to the National Labor Relations Board in cases regarding labor relations in the Commonwealth of Puerto Rico. S. 712 would make decisions of the Labor Relations Board of Puerto Rico reviewable by the Court of Appeals for the First

Circuit. It is unclear under these provisions whether such judicial review by the court of appeals would be governed by federal labor law or by the labor law of the Commonwealth of Puerto Rico. If the latter, it would be undesirable to provide for federal court review, since review could be had more efficiently and appropriately in the courts of the Commonwealth of Puerto Rico.

VI. Issues of Puerto Rico Law

Under the Commonwealth option of S. 712, the Puerto Rico Federal Relations Act would be amended to provide, "Notwithstanding any other provisions of law: (1) The District Court shall not undertake to construe a theretofore unconstrued Puerto Rico statute or regulation or decide a theretofore undecided point of substantive Puerto Rico nonstatutory law without having given the Supreme Court of Puerto Rico the opportunity to construe such statute or regulation or to rule upon such point of Puerto Rico Law." The Commonwealth option of S. 711 would call for negotiations to develop implementing legislation with similar import.

Under present law, the Court of Appeals for the First Circuit and the District Court for the District of Puerto Rico occasionally certify important questions of Puerto Rico law to the Supreme Court of Puerto Rico and otherwise seek to apply that law in accordance with its terms and the published rulings of the Puerto Rico Courts. This provision would seem to alter that practice by requiring advance certification of any and all questions of Puerto Rico law, no matter what the circumstances, whenever there is not a Puerto Rico case or statute directly on point. This would be contrary to the present practice in the federal courts and would add considerably to the time and expense of any federal court litigation raising issues of Puerto Rico law.

Finally, one matter of vital interest cuts across all issues in this legislation impacting on the Judiciary. Regardless of the ultimate policy choices adopted by Congress, it is essential that adequate additional funding be provided to meet the increased costs flowing from implementation of the legislation. We strongly urge that your Committee carefully assess the costs associated with the various options and assure sufficient and timely funding to support the judiciary's role as finally determined by the Congress.

We are currently reviewing the additional issues raised in your letter to me dated June 13, 1989. I anticipate comments will be forthcoming before your scheduled hearings in July.

If we can be of any further assistance, please let me know.

Sincerely,

James E Macklin, Jr

for L. Ralph Mecham
Director

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

July 7, 1989

Honorable J. Bennett Johnston
Chairman, Committee on Energy and
Natural Resources
United States Senate
364 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

This is to respond to your letter of June 13, 1989, concerning legislation relating to the status of Puerto Rico.

The Executive Committee of the Judicial Conference of the United States recently approved the text of a letter to you under my signature setting forth the views of the Judiciary on this legislation. That letter, dated July 5, 1989, was in response to your letter of May 15, 1989, on the same subject and should be considered the basic document on the position of the Judicial Conference.

While most of the issues are adequately covered in my prior letter, the following supplementary comments on matters highlighted in your June 13 letter and the accompanying transcript might be useful:

(1) Title II (Statehood)

The question concerns where jurisdiction should be placed to decide disputes arising under this legislation. The Judicial Conference has no current view concerning the allocation of jurisdiction over such disputes. However, it would strongly oppose vesting mandatory jurisdiction of such disputes in the United States Supreme Court. I need not tell you that the Court is now overburdened. Only last year the Congress passed, overwhelmingly, legislation eliminating most of the last remnants of the court's mandatory jurisdiction (see Public Law No. 100-352). In view of the constant growth of the Federal docket, and the increase in the number of lower court judges whose decisions come before the Supreme Court for review, the Court's workload is growing to such an extent that it could not accommodate the proposed mandatory jurisdiction. Chief Justice Rehnquist has authorized me to inform you that he emphatically agrees with this position.

As to whether such disputes should be referred to special masters or panels, perhaps appointed by the Supreme Court, there is no obvious reason why such bodies would be better qualified to decide these disputes than sitting Federal judges. In considering such an alternative, moreover, there are at least two potential problems you would want to be aware of: one, the added costs of creating, maintaining and administering such special tribunals, which would require the establishment of a new bureaucratic structure, and, two, the delays and complications involved in conducting litigation before such a newly created body with no established rules, procedures or precedents.

(2) Title IV (Commonwealth) - Subpart 15

(a) This title contains a provision that would prohibit the district court from construing a theretofore unconstrued Puerto Rico statute or regulation or decide an undecided point of Puerto Rico non-statutory law. In the partial transcript of the Committee hearing enclosed in your letter, you clearly pointed out the problems that would arise under such a provision. Under present law, of course, the district court must follow controlling State law on matters of substance and has discretion to refer to the State court a critical question of interpretation of a State statute or regulation or of State non-statutory law where that might obviate the need for decision by the Federal court of an important point of State law. But as presently drafted, this section could open the way for repeated references to the State court of procedural and substantive questions as they arose in the course of litigation. The Federal court would be required to refer not only important issues but also relatively routine and unimportant ones such as discovery disputes, evidentiary rulings, and minor substantive points. In addition, the proposal would invite constant disputes over whether a point of law is "theretofore undecided"; since judicial precedents often are subject to varying interpretations, there could be many arguments over what a prior decision holds. The Judicial Conference, as indicated in my prior comments on behalf of the Conference, would oppose this provision because it would greatly complicate and delay proceedings in the district court.

(b) The issue concerning the requirement that proceedings in the district court must be in Spanish is addressed in my prior letter to you. As that letter suggests, the proposed legislation would pose considerably fewer problems if the use of Spanish were made contingent upon agreement of all parties and discretionary with the judge in the particular case.

(c) The issue concerning vesting jurisdiction in the Federal Court in the District of Columbia over disputes under the Puerto Rico Federal Relations Act is also addressed in my prior letter. I would add to what is said there that the interpretation and construction of laws involving the operation of the Government is a major element of the work of all of the Federal courts. While the Federal Courts in the District of Columbia have many cases involving the work of Federal administrative agencies, there is nothing about those cases that would make those courts more expert in dealing with issues under the Federal Relations Act than the courts in Puerto Rico, which of course would be more familiar with the subject matter. Nor is it apparent that uniformity of decision would be enhanced by transferring venue of such cases to the District of Columbia from Puerto Rico and the First Circuit.

Furthermore, the proposed certification of issues, arising under the Act, to the United States Court of Appeals for the District of Columbia from the United States Court of Appeals for the First Circuit would institute the only known instance of a court in one circuit having to certify a question to another circuit, a rare and unprecedented departure from the traditions of the Federal courts of appeals. This could result in significant delays and could cause great confusion in handling multi-party cases with numerous different causes of action, some of which might have to be certified and others of which might not. In addition, the Act also proposes transferring to the United States District Court for the District of Columbia all cases brought against the Commonwealth or a Commonwealth official. This would work an unfair hardship on private parties suing the Commonwealth government, who could be forced to litigate in a trial court 1,000 miles distant. The Act makes no change in the present system (trial court consideration in Puerto Rico and appellate review in the First Circuit) in cases involving private parties where the Puerto Rico Federal Relations Act is not involved. That, of course, is sensible. However, taken together with the other proposals, it would result in Puerto Rico cases going three different routes depending on the parties and issues involved in the cases. This would defeat the whole concept of regional circuits exercising regional jurisdiction that forms the very basis of our Federal judicial system.

I might also point out that this legislation amends the Puerto Rico Federal Relations Act to provide that all Federal statutes and agency regulations, or parts thereof, not falling within three relatively narrow categories are inapplicable in Puerto Rico unless such statutory laws and regulations have "proper regard for the economic, cultural, ecological, geographic, demographic and other local conditions of the Commonwealth of Puerto Rico" or Congress specifically finds that there is an overriding national interest that such law should apply in Puerto Rico. See Subdivisions (b) and (f) of subpart 4 of S. 712. Whether Federal laws are inapplicable in Puerto Rico is subject to judicial determination. See Subdivision (c) of subpart 4 of S. 712. Whatever the serious difficulties associated with this proposal as discussed in my prior letter, the Federal courts in the District of Columbia have no expertise in making the required determination.

In your letter you request information on "current workloads" insofar as they are relevant to the issue of the appropriate forum for hearing Puerto Rico Federal Relations Act cases. If you are seeking information on whether the proposal can be justified based on relative caseload burdens in the First Circuit and the District of Columbia Circuit, I would point out that as of June 30, 1988, the United States Court of Appeals for the First Circuit reported 390 appeals pending per panel, the third lowest number in the nation. The United States Court of Appeals for the District of Columbia, on the other hand, reported 530 appeals pending per panel. Based on these numbers, it would appear, from a caseload point of view, that the First Circuit would be more capable of handling these cases than the District of Columbia Circuit. I should point out that the First Circuit did report more cases filed per panel in 1988 (620) than the District of Columbia Circuit (481). However, it is well accepted that the District of Columbia Circuit has an especially difficult caseload because of its heavy administrative agency docket. There were 267 administrative agency appeals filed in the District of Columbia Circuit per panel in FY 1988 compared to [illegible] administrative agency appeals per panel in the First Circuit in FY 1988. I would also point out that, absent some otherwise justifiable reason, it would seem unwise to suggest placing certain types of cases in one circuit versus another merely based on the circuits' relative caseloads.

Because of the time available, the Executive Committee of the Judicial Conference has not formally approved these additional comments. They are, however, consistent with and supportive of the positions previously communicated to you on behalf of the Executive Committee.

If I can be of any further assistance, please let me know.

Sincerely,

James E Macklin, Jr.

for L. Ralph Mecham
Director

1989 AUG -2 AM 12: 52

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

July 26, 1989

Honorable J. Bennett Johnston
Chairman, Committee on Energy
and Natural Resources
United States Senate
364 Dirksen Senate Office Building
Washington, D.C. 20510-6150

Dear Mr. Chairman:

We have been considering the concerns raised in your June 13, 1989 letter to me, and at the July 11, 1989 hearing, about the best means for ensuring the absolute integrity of the referendum process and the certification. As requested, a review has been made of some options you might consider. These are discussed below. I should reiterate that, while Judges Campbell and Breyer and their senior staff attorneys have made a major contribution to thinking the issues through and providing me with the basis for this letter, the delineation of the options and brief comments are intended to provide technical assistance to the Committee as requested and are not related in any way to the political circumstances in Puerto Rico.

As it now stands, S. 712 provides that the referendum will be conducted under the laws of the Commonwealth of Puerto Rico and that the result of the referendum will be certified by the Governor of the Commonwealth. Title I, §§ 2(c), (d). However, this is supplemented by conflicting provisions governing the resolution of disputes arising out of the referendum process. If the statehood position wins the referendum, any disputes arising out of the electoral process shall be adjudicated by the United States District Court for the District of Puerto Rico and the federal appellate courts, with the jurisdiction of the Commonwealth courts eliminated. Title II, § 2.6(a). If the Commonwealth position wins, then, since Title IV contains no specific provision governing the forum for resolution for disputes arising out of the electoral process, presumably the Commonwealth courts will determine such disputes, with concurrent jurisdiction in the federal district court in Puerto Rico over disputes of federal constitutional or statutory dimension. Under

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1939 – 1989

this arrangement, the nature of the forum for resolving electoral disputes would itself turn on the outcome of the referendum. We believe that this is an invitation to confusion and should not be allowed to stand. It appears that there are the following five major alternative approaches to the problem of the certification of the results of the referendum and the resolution of disputes arising out of the electoral process.

1. The first would be to treat this election essentially like other state and Commonwealth elections under which the referendum would be administered by Commonwealth officials under the election laws of the Commonwealth. Challenges to aspects of the election would initially be determined by Puerto Rico's election authority with review by the Commonwealth courts. Complainants raising specifically federal constitutional challenges to the election, or other existing federal causes of action, would have the option of bringing suit in the United States District Court for the District of Puerto Rico. This approach -- to do nothing -- leaves undisturbed, of course, the problem of decision of all challenges to the election in the first instance by judicial bodies perceived in the Commonwealth to have strong ties to one or another status position.

2. The other extreme would be to "federalize" the election altogether by ordering in the Act that it would be conducted under federal law by federal officials. This would be an exceptional action that could be undertaken only at great expense and by a substantial federal bureaucracy. Given that Puerto Rico already has in place knowledgeable election officials and an Elections Commission, this course of action would seem highly questionable.

3. The statute could continue to provide, as the proposed legislation now does, that the election will be administered by Commonwealth officials under Commonwealth law. However, under this third alternative judicial review of any and all disputes arising in the course of the electoral process would be made unavailable in the Commonwealth courts (or in the District of Puerto Rico). Instead, review of any and all challenges to the electoral process could be had only in a specially appointed three-judge federal court. We question the desirability of this course. There may be many fairly technical disputes in the counting of ballots, etc., that would be better handled by local tribunals with greater familiarity with the conduct of local elections. Since much of the evidence and testimony of the witnesses would likely be in Spanish, language might also pose a problem.

4. Another alternative would be to preserve local court jurisdiction over most election disputes, but to provide that a three-judge federal court shall have exclusive jurisdiction to hear any civil action of that kind that the United States District Court for the District of Puerto Rico would ordinarily, in the absence of this provision, have the power to hear. Under this approach, the federal three-judge court would hear only federal constitutional and statutory challenges to the referendum process that would otherwise go to the federal district court in Puerto Rico. A challenge to the Governor's certification of the winning position -- i.e., a claim of voting irregularities so substantial as to affect the outcome of the election -- that did not have a basis under current federal law would therefore be left to determination by the Commonwealth courts. Given the lack of clarity of the case law governing when a claim of the electoral irregularities amounts to a claim of federal constitutional dimension, it is possible that the three-judge court might waste considerable resources wrestling with the question whether potentially dispositive irregularities amounted to a federal claim. At the same time, the basic question of the integrity of the election might be left primarily to the Commonwealth courts, since most election disputes are not subject to federal jurisdiction.

5. The option which, on brief consideration, seems most promising to us would allow the election to be held under local auspices and local election laws, including some local judicial review, with certification of the result by the Governor of the Commonwealth as under S. 712. A federal cause of action would be created for then challenging the Governor's certification. Such an action would have to be brought within sixty days of the certification before a three-judge federal court created to hear these claims. As elements of such an action a plaintiff would have to demonstrate not only that some electoral irregularity had occurred, but also that the alleged irregularity or irregularities had been so substantial as to affect the outcome of the referendum and call into question the choice certified by the Governor. If both elements of the cause of action were established, the three-judge court would be empowered to grant appropriate relief, including nullification of the entire referendum, ordering a recount or recounts, or any other relief it deemed appropriate in order to preserve the integrity of the referendum process. The legislation would also grant the three-judge court exclusive jurisdiction over all federal claims, both statutory and constitutional, and all state claims challenging the result certified by the Governor.

The three-judge tribunal would be empowered to receive evidence and hear argument. In making its findings and rulings, the three-judge court would be required to give only such weight to the determinations of local authorities and of the Commonwealth courts as it deemed appropriate under the circumstances. By the same token, the tribunal would not be required to provide de novo review of any and all claims of electoral fraud brought under the suggested provision, except as it determined such review to be necessary to reach a proper result.

The statute probably should provide that the three-judge court will consist of two district judges and one court of appeals judge (or two appeals judges and one district court judge), not resident in Puerto Rico, appointed by the Chief Judge of the First Circuit Court of Appeals. The statute could provide that such designated judge could, with proper authorization by the Chief Justice of the United States, include judges from outside the First Circuit. The tribunal should be directed to hold its proceedings in Puerto Rico.

It would be desirable, also, if the Attorney General of the United States were empowered to intervene in such a proceeding, at the request of the court, to lend assistance in the gathering and presentation of relevant evidence. This would enable the tribunal to obtain the benefit of federal investigators to look into allegations of fraud.

Just to indicate in general the nature of our ideas, and not as a final draft, here is how such provisions might look:

I. Proposed new cause of action provisions:

cause of action

Any aggrieved person (including, without limitation, any political party), within 60 days after the certification by the Governor of the results of the referendum pursuant to Title I, Section 2(c), may institute an action to challenge the choice certified by the Governor on the basis that (1) an electoral irregularity or irregularities had occurred, and (2) that the irregularity or irregularities were so significant as to affect the outcome of the referendum and call into question the choice certified by the Governor.

Jurisdiction; exhaustion of remedies

The three-judge court provided for in section ____ shall have exclusive jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the aggrieved party shall have exhausted any administrative or other remedies provided by federal law or the law of Puerto Rico.

Remedies

In any proceeding instituted pursuant to subsection ____ of this section, if the court finds that there has been an electoral irregularity or irregularities so significant as to affect the outcome of the referendum and call into question the choice certified by the Governor, the court is empowered to grant appropriate relief, including nullification of the entire referendum, ordering a recount or recounts, or any other relief deemed appropriate to preserve the integrity of the electoral process.

Intervention

The Attorney General of the United States is empowered to intervene at the request of the court in any proceeding brought under this section in order to assist in the gathering and presentation of evidence. Any aggrieved person with a federal constitutional or federal statutory claim arising out of the same factual nexus as an action brought under this section may intervene in that action in a manner deemed timely by the court in its discretion. Failure of such an aggrieved person to timely intervene will result in foreclosure of that person's federal constitutional or statutory claim.

Evidence

The court may give such weight as it deems appropriate to the determinations of the Commonwealth Elections Commission, the courts of the Commonwealth and any other local authority or tribunal. The court is not required to provide de novo review of any and all claims of irregularities already determined by a local

> authority or tribunal, except as it deems necessary.

II. Proposed three-judge court provisions:

> Any claims brought under the United States Constitution or a federal statute, or any claim brought to challenge the result certified by the Governor, whether brought under this Act or under the law of the Commonwealth of Puerto Rico, shall be heard by a three-judge court which shall have exclusive jurisdiction over all such claims. The court shall receive evidence and hear argument, as it deems necessary. The provisions of 28 U.S.C. § 2284(b)(3) shall apply to proceedings of the three-judge court. It shall be the duty of the Chief Judge of the First Circuit Court of Appeals, with proper authorization by the Chief Justice of the United States under 28 U.S.C. § 291(a) where necessary, to designate three judges, of whom at least one shall be a circuit judge and the remaining judge or judges shall be district court judges, to hear and determine any such claim. No judge resident in Puerto Rico shall be designated. Hearings of the three-judge court shall be conducted in Puerto Rico. An appeal from a final judgment of the three-judge court will lie to the Supreme Court of the United States by way of certiorari.

The proposal might also contain a provision requiring -- in addition to any similar local requirements -- preservation of all ballots and materials related to the referendum pending resolution of any and all challenges to the Governor's certification under the new cause of action, or, if no challenge is brought, pending expiration of the sixty-day period following certification during which a challenge could be brought. Federal criminal penalties possibly could be provided for violation of this requirement.

Such an approach would, of course, require appropriate alteration of existing provisions in S. 712 for the resolution of disputes under the Act, Title II, § 7(b)(3), and Title III, § 2.6. Section 3(d) of Title I could be revised to read, "The election laws of the Commonwealth of Puerto Rico shall apply to the referendum held under this Act, except as otherwise specifically provided in this Act." Other provisions prescribing when the status option certified by the Governor shall go into effect possibly might require recasting as well in order to prevent implementation of the referendum result pending weighty and substantial electoral challenges. perhaps it could be provided that the result will not take effect for sixty days following the Governor's certification, and the three-judge court could be given specific authority to stay implementation of the result, in its discretion, if a potentially meritorious challenge to the result is filed.

I hope this material will be of assistance to you and your Committee as you consider this important bill.

Sincerely,

L. Ralph Mecham
Director

The CHAIRMAN. Gentlemen, thank you very much. You have been most helpful.

Senator McCLURE. May I ask one question? Because I am intrigued peripherally—and I certainly am not going to explore it very far.

Does your experience indicate that translators are capable only of translating 10 pages per day?

Judge CAMPBELL. I do not think that is experience. We got that from the head of the language school in Monterrey.

Senator McCLURE. I just wonder what their work day is.

Judge CAMPBELL. I think it might depend also on the nature of the 10 pages. She might have been thinking of 10 single-spaced legal documents as compared with 10 transcript pages. But that was what we—this was 10 years ago the director of the school in Monterrey said that.

Senator McCLURE. Well, I am sure you know more about it than I do, but if I had a staff person that produced that much and no more, I would be asking some questions.

Judge BREYER. We have transcript problems from all districts, whether it is in English or Spanish.

Senator McCLURE. As I say, it is perhaps peripheral to this discussion perhaps, but it does bear upon your estimate of expenses.

Again, I would repeat what I said earlier, that I think this is a separable question that perhaps should be separated from status. But again, I will look to the partners that are involved to give us some advice as to their feeling of how central this issue may be to the issue of them having a proposition upon which they can vote.

I am most concerned, in the event that we have to get into it, with the opportunity for a defendant to have a fair trial. I am troubled by the issue that you mentioned, that it may be impossible to get a grand jury or a trial jury impaneled when those who understand English, out of the general population, may be less than half of the total population.

Do you exclude from the jury panels those persons who are not fluent in English?

Judge CAMPBELL. There is a test which jurors go through. It has been estimated that I think about 50 percent of the people in Puerto Rico can speak English. There are many people in Puerto Rico, as you know, who speak very good English.

I would say one mitigating factor is that in many cases where you have—in a typical criminal case you will frequently have witnesses who testify in Spanish who then are translated into English. The jurors will hear the Spanish witness in Spanish, and then they will hear the witness, the translation in English. So they will have a greater opportunity than in a trial in this country to hear the witness' testimony.

Senator McCLURE. But if they are excluded from the jury panel in the first instance.

Judge BREYER. I agree with you.

Judge CAMPBELL. This is an issue. People have written extensive Law Review articles on both sides about whether you get an adequate cross-section. It is a problem.

Our concern on the other side would be that if we ended up with a system in Puerto Rico where appeals were taking one, two, and three years because of the difficulties of translation and arguments over whether the translation was properly done and so forth, certainly one possibility, Senator, would be to try this on some kind of a pilot basis and see how it went.

I think our principal concern here was to have a blanket rule which said, with no discretion in the court at all, it has got to be done in Spanish unless—if one party wants it to be done in Spanish.

Senator McClure. What if we turned that around and said only if all parties agree that it be held in Spanish?

Judge Campbell. Well, that gets you into, I would say, more into the area of reason. The concern is that we really do not have any experience with a Federal District Court that has been operated this way.

You may be right that 10 pages is incorrect, or you may not be. I do not know. That was the testimony that we heard from this particular individual. But it is not something, it seems to me, that should be rushed into, and it certainly should not—the danger is if it comes prior to the status legislation, it would be effectively unchangeable.

Senator McClure. I lean toward the idea that we ought to create an expedited procedure such as the Chairman has referred to, with respect to the electoral process. Whether it is a TECA type of court, or a three-judge panel, and if I am thinking of a designated three-judge panel, I would think it should come from the district that ordinarily has jurisdiction, from the circuit that has jurisdiction rather than broader than that.

But I think, as you suggested, that between our staffs we can find a workable solution to that particular question. I look forward to doing that.

Thank you very much, Mr. Chairman. I have no more questions at this time.

The Chairman. Thank you, Senator McClure.

Gentlemen, thank you very much. We appreciate your help.

Next we have a panel with Brigadier General Michael J. Byron, Marine Corps, who is Director of Inter-American Region of the Department of Defense, stationed here in Washington; and Mary V. Mochary, Principal Deputy Legal Adviser to the Department of State.

General Byron and Ms. Mochary, welcome.

General, why do we not begin with you with the Department of Defense, and then we will hear from State.

STATEMENT OF BRIG. GEN. M.J. BYRON, ACTING DEPUTY ASSISTANT SECRETARY OF DEFENSE (INTER-AMERICAN AFFAIRS), DEPARTMENT OF DEFENSE

General Byron. Mr. Chairman, Senator McClure, I am very pleased to be here this afternoon and welcome the opportunity to testify before the committee about the Department of Defense's views on S. 712, a bill to provide for the referendum on the political status of Puerto Rico.

My prepared statement, which has been submitted for the record, is focused primarily on defense and national security issues. I will now briefly summarize it for you.

We have assessed how the legislation as written will impact on this department and considered the impact on national security interests proposed by each status option. For the purpose of this assessment we considered the strategic value of Puerto Rico within the context of the following defense requirements: first, regional and/or global conflict; U.S. presence and support for our friends and allies in the Eastern Caribbean and in the Caribbean Basin as a whole.

And for those two purposes, the naval station at Roosevelt Roads; the radar sites which are part of the regional Caribbean Basin radar network and communications support are essential. For the war on drugs—a subject of increasing concern for all of us—we need the presence of the radar sites which are part of the Caribbean Basin radar network, along with, again, the requisite support and communication facilities. And finally, as a unique U.S. and allied training facility, such as Camp Santiago, where just last month members of the regional security system from the Eastern Caribbean states trained as part of the workup for the highly successful exercise Tradewinds 1989.

Puerto Rico is important to us not only for its strategic location, but also for the tremendous training capability which cannot be duplicated anywhere else on the eastern coast of the United States. In short, these facilities remain vital to the U.S. Atlantic Command training and readiness, with no suitable options available for an alternate site that allows the breadth of integrated training required.

Defense facilities in Puerto Rico must also be viewed in relationship to our slow but steady withdrawal from the Caribbean. The committee should note that under the Panama Canal treaties, our forces will be withdrawn from Panama by 1999. As of 1 July, we close down U.S. Forces Caribbean in Key West, Florida. If we lose access to facilities in Puerto Rico, our only remaining operational facility would be Guantanamo Bay, Cuba. Guantanamo Bay has a strategic position, but it is obviously vulnerable to Cuban pressures.

These closures, coupled with a continued reduction of an already modest military assistance program for the Caribbean states, sends a negative message to our regional allies and adversely impacts on our global military interests.

The Department of Defense considers Puerto Rico as a strategic pivot point of major importance to the U.S. national security, and strongly recommends that provisions be made for the retention of the following installations and facilities: the entire Roosevelt Roads complex, including communications station and its outlying transmitter and receiver sites; facilities on Vieques Island; the naval communications facility at Sabana SECA; the Punta Borinquen radar site, which is a CBR, or Caribbean Basin radar network site; Punta Salinas radar site, which is also integrated into the Caribbean Basin radar network; and access to San Juan International Airport of Muniz; Air National Guard base and Borinquen International Airport; and finally, use of Camp Santiago training area.

I would like to highlight some of the provisions of the bill which could impact on our national security interests. And again, as Judge Breyer has said, our assessment focuses on the impact items and is not necessarily negative in tone.

Under statehood, Title II of S. 712 defines a statehood choice for Puerto Rico. As currently written, this option has the least impact from the defense perspective. As we understand the statehood alternative, Puerto Rico could be admitted to the Union on a basis essentially similar to other states. The Federal Government would continue to be responsible for security and defense, with Congress reserving exclusive authority over lands held for defense or Coast Guard purposes. However, unless the President or Secretary of Defense determined such lands to be critical areas, Puerto Rico could exercise concurrent jurisdiction over them.

This might be troublesome in practice with respect to such matters as arrest, custody and trial of service personnel on U.S. military installations; but, again, it is really minimal in its impact. Other agencies of the Executive Branch will cover those provisions in the legislation which would accord the new state different treatment from that currently afforded the other 50 states.

[The prepared statement of General Byron follows:]

10 JUL 1989

PREPARED STATEMENT OF
BRIGADIER GENERAL M. J. BYRON,
ACTING DEPUTY ASSISTANT SECRETARY OF DEFENSE
(INTER-AMERICAN AFFAIRS),
DEPARTMENT OF DEFENSE
BEFORE THE
COMMITTEE ON ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE
JULY 11, 1989

MR. CHAIRMAN, I AM VERY PLEASED TO BE HERE THIS AFTERNOON, AND WELCOME THE OPPORTUNITY TO TESTIFY BEFORE THIS DISTINGUISHED COMMITTEE ABOUT THE DEPARTMENT OF DEFENSE'S VIEWS ON S. 712, A BILL "TO PROVIDE FOR A REFERENDUM ON THE POLITICAL STATUS OF PUERTO RICO." IF THIS BILL WERE TO BECOME LAW, A REFERENDUM TO BE HELD IN 1991, WOULD PRESENT THE VOTERS OF PUERTO RICO WITH THREE POLITICAL STATUS OPTIONS: (1) STATEHOOD; (2) INDEPENDENCE; (3) "ENHANCED COMMONWEALTH", EACH AS DEFINED IN THE BILL.

I WILL FOCUS MY REMARKS PRIMARILY ON DEFENSE AND NATIONAL SECURITY ISSUES. PLEASE NOTE, HOWEVER, THAT THERE ARE OTHER SIGNIFICANT LEGAL, CONSTITUTIONAL AND POLICY ISSUES PRESENTED BY

THE BILL WHICH ARE OF PRIMARY INTEREST TO OTHER EXECUTIVE BRANCH AGENCIES.

WE HAVE ASSESSED HOW THE LEGISLATION, AS WRITTEN, WILL IMPACT THIS DEPARTMENT, AND CONSIDERED THE IMPACT ON NATIONAL SECURITY INTERESTS POSED BY EACH STATUS OPTION. FOR THE PURPOSE OF THIS ASSESSMENT, WE CONSIDERED THE STRATEGIC VALUE OF PUERTO RICO WITHIN THE CONTEXT OF THE FOLLOWING DEFENSE REQUIREMENTS: (1) REGIONAL AND/OR GLOBAL CONFLICT; (2) US PRESENCE AND SUPPORT FOR OUR FRIENDS AND ALLIES IN THE EASTERN CARIBBEAN AND CARIBBEAN BASIN AS A WHOLE. FOR THOSE TWO PURPOSES, THE NAVAL STATION AT ROOSEVELT ROADS, THE RADAR SITES WHICH ARE PART OF THE CARIBBEAN BASIN RADAR NETWORK, AND THE COMMUNICATIONS SUPPORT ARE ESSENTIAL; (3) FOR THE "WAR ON DRUGS," WE NEED THE PRESENCE OF TWO RADAR SITES WHICH ARE PART OF THE CARIBBEAN BASIN RADAR NETWORK AND THE COMMUNICATION FACILITIES ARE REQUIRED; (4) A UNIQUE US AND ALLIED TRAINING FACILITY, SUCH AS AT CAMP SANTIAGO WHERE JUST LAST MONTH MEMBERS OF THE

REGIONAL SECURITY SYSTEM TRAINED AS PART OF THE WORK UP FOR THE HIGHLY SUCCESSFUL EXERCISE TRADEWINDS 89. PUERTO RICO IS IMPORTANT TO US NOT ONLY FOR ITS STRATEGIC LOCATION, BUT ALSO FOR THE TREMENDOUS TRAINING CAPABILITY WHICH CAN NOT BE DUPLICATED ANYWHERE ELSE ON THE EAST COAST OF THE US. IN SHORT, THESE FACILITIES REMAIN VITAL TO ATLANTIC FLEET TRAINING AND READINESS, WITH NO SUITABLE OPTIONS AVAILABLE FOR AN ALTERNATE SITE THAT ALLOWS THE BREADTH OF INTEGRATED TRAINING REQUIRED.

SINCE WORLD WAR II WE HAVE SLOWLY BUT STEADILY WITHDRAWN OUR PRESENCE FROM THE EASTERN CARIBBEAN, AS HAS THE UNITED KINGDOM. STARTING WITH OUR BASE IN TRINIDAD AND TOBAGO, WE HAVE FOR VARIOUS REASONS, MOSTLY BUDGETARY, REMOVED OURSELVES FROM THE AREA. AS OUR PRESENCE DWINDLED, WE BEGAN TO SEE OUR ADVERSARIES TAKING ADVANTAGE OF OUR PERCEIVED LACK OF INTEREST. EVEN THE SOUTH AMERICAN DRUG CARTELS ARE REALIZING THE POTENTIAL WHICH CAN BE GAINED IN THE EASTERN CARIBBEAN. AS WE CONTINUE TO PUSH OUR WAR ON DRUGS, THE EASTERN CARIBBEAN ISLANDS HAVE THE

POTENTIAL TO BECOME CENTERS FOR TRANSSHIPMENT OF NARCOTICS TO BOTH THE UNITED STATES AND EUROPE. EXPERIENCE HAS SHOWN THAT WE CAN EXPECT INSTABILITY ALSO TO INCREASE AS NARCO DOLLARS FLOW INTO THE ECONOMY. THE COMMITTEE SHOULD ALSO NOTE THAT UNDER THE PANAMA CANAL TREATIES, OUR FORCES WILL BE WITHDRAWN FROM PANAMA IN 1999. IF WE WERE TO LOSE OUR PRESENCE IN PUERTO RICO AND PANAMA, OUR ONLY CARIBBEAN BASE WOULD BE GUANTANAMO BAY, CUBA, 600 MILES TO THE WEST OF PUERTO RICO. GUANTANAMO BAY HAS A STRATEGIC POSITION, BUT IT IS OBVIOUSLY VULNERABLE TO CUBAN PRESSURE. ADDITIONALLY, IT JUST DOES NOT HAVE THE SAME CAPABILITY AS ROOSEVELT ROADS. AS OF 1 JULY, WE CLOSED DOWN U.S. FORCES CARIBBEAN IN KEY WEST, FLORIDA. THIS CLOSURE, COUPLED WITH THE CONTINUED REDUCTION OF AN ALREADY MODEST MILITARY ASSISTANCE PROGRAM TO THE EASTERN CARIBBEAN, SENDS A NEGATIVE MESSAGE TO OUR FRIENDS THROUGHOUT THE CARIBBEAN.

THE DEPARTMENT OF DEFENSE CONSIDERS PUERTO RICO AS A STRATEGIC PIVOT POINT OF MAJOR IMPORTANCE TO US NATIONAL SECURITY AND

STRONGLY RECOMMENDS THAT PROVISIONS BE MADE FOR THE RETENTION OF THE FOLLOWING INSTALLATIONS AND FACILITIES:

- THE ENTIRE ROOSEVELT ROADS COMPLEX, INCLUDING THE COMMUNICATIONS STATION AND ITS OUTLYING TRANSMITTER AND RECEIVER SITES;
- VIEQUES ISLAND FACILITIES;
- THE NAVAL SECURITY GROUP AT SABANA SECA;
- THE PUNTA BORINQUEN RADAR SITE (IMPORTANT FOR ITS ROLE IN THE CARIBBEAN BASIN RADAR NETWORK);
- THE PUNTA SALINAS RADAR SITE (ALSO IMPORTANT FOR ITS ROLE IN THE CARIBBEAN BASIN RADAR NETWORK);
- ACCESS TO THE SAN JUAN INTERNATIONAL AIRPORT/MUNIZ AIR NATIONAL GUARD BASE, AND BORINQUEN INTERNATIONAL AIRPORT.
- USE OF CAMP SANTIAGO TRAINING AREA.

THERE ARE MANY OTHER OUTLYING AREAS WHICH CONTRIBUTE TO EACH OF THE ABOVE MENTIONED FACILITIES I HAVE NOT LISTED THEM HERE, BUT

I HAVE PROVIDED YOUR STAFF WITH A COMPLETE LIST OF ALL PRESENT DEPARTMENT OF DEFENSE FACILITIES, WHICH ALSO INCLUDES THE ACREAGE OF EACH. IF THIS LIST DOES NOT SUFFICE, WE WILL PROVIDE YOU WITH SUCH ADDITIONAL INFORMATION AS YOU MAY REQUIRE. IN THAT CONNECTION, WE HAVE ALSO PROVIDED THREE CHARTS WHICH MAY BE OF INTEREST TO YOU. ONE SHOWS WHERE THE MAJOR FACILITIES ARE LOCATED, ONE SHOWS THE PUERTO RICAN OPERATING AREA, AND THE LAST ONE SHOWS WHERE THE FACILITIES ARE LOCATED ON THE ISLAND OF VIEQUES. WE HAVE ALSO PROVIDED YOUR STAFF WITH A BRIEF OVERVIEW OF THE ECONOMIC IMPACT WHICH SOME OF THE FACILITIES HAVE TO THE LOCAL ECONOMY.

I WOULD LIKE TO HIGHLIGHT SOME OF THE PROVISIONS OF THE BILL WHICH COULD IMPACT ON OUR NATIONAL SECURITY INTERESTS.

STATEHOOD

TITLE II OF S.712 DEFINES A " STATEHOOD" CHOICE FOR PUERTO RICO. AS CURRENTLY WRITTEN, THIS OPTION IS THE LEAST TROUBLESOME FROM THE DEFENSE PERSPECTIVE.

AS WE UNDERSTAND THE STATEHOOD ALTERNATIVE, PUERTO RICO COULD BE ADMITTED TO THE UNION ON A BASIS ESSENTIALLY SIMILAR TO OTHER STATES. THE FEDERAL GOVERNMENT WOULD CONTINUE TO BE RESPONSIBLE FOR SECURITY AND DEFENSE, WITH CONGRESS RESERVING EXCLUSIVE AUTHORITY OVER LANDS HELD FOR DEFENSE OR COAST GUARD PURPOSES. HOWEVER, UNLESS THE PRESIDENT OR THE SECRETARY OF DEFENSE DETERMINES SUCH LANDS TO BE "CRITICAL AREAS," PUERTO RICO COULD EXERCISE CONCURRENT JURISDICTION OVER THEM. THIS MIGHT BE TROUBLESOME IN PRACTICE WITH RESPECT TO MATTERS SUCH AS ARREST, CUSTODY AND TRIAL OF SERVICE PERSONNEL ON U.S. MILITARY INSTALLATIONS. OTHER AGENCIES OF THE EXECUTIVE BRANCH WILL COVER THOSE PROVISIONS IN THE LEGISLATION WHICH WOULD ACCORD THE

NEW STATE DIFFERENT TREATMENT FROM THAT CURRENTLY AFFORDED THE OTHER 50 STATES.

ENHANCED COMMONWEALTH

UNDER THE ENHANCED COMMONWEALTH OPTION, THE GOVERNOR OF PUERTO RICO MAY TAKE ANY OFFICIAL ACTION TO PROMOTE THE INTERNATIONAL INTEREST OF PUERTO RICO THAT IS NOT PROHIBITED BY LAW; HOWEVER, THE PRESIDENT MAY DETERMINE WITHIN 30 DAYS THAT SUCH ACTION WOULD IMPERIL US FOREIGN RELATIONS OR NATIONAL DEFENSE, IN WHICH CASE THE GOVERNOR'S AUTHORITY FOR THAT ACTION WOULD BE WITHDRAWN. THIS PROCEDURAL REQUIREMENT FOR A PRESIDENTIAL DETERMINATION IS UNDULY CUMBERSOME, AND COULD CAUSE SERIOUS DELAY UNDER CRITICAL CIRCUMSTANCES. THIS PROVISION COULD ALSO BE POLITICALLY COSTLY SINCE IT COULD PUT THE US AND PUERTO RICAN GOVERNMENTS AT ODDS WITH EACH OTHER. THE EXEMPTION FROM ANY FUTURE MILITARY DRAFT IS INCONSISTENT WITH US RESPONSIBILITY FOR NATIONAL DEFENSE. ADDITIONALLY, PUERTO RICO WOULD IMMEDIATELY

ACQUIRE TITLE TO ALL LANDS CEDED BY SPAIN TO THE US BY THE 1898 TREATY OF PEACE. THIS WOULD REQUIRE US TO RELINQUISH SEVERAL SMALLER PROPERTIES. THE MAJOR FACILITIES REFERRED TO ABOVE WERE ACQUIRED IN FEE, AND WOULD NOT BE AFFECTED BY THIS PROVISION.

INDEPENDENCE

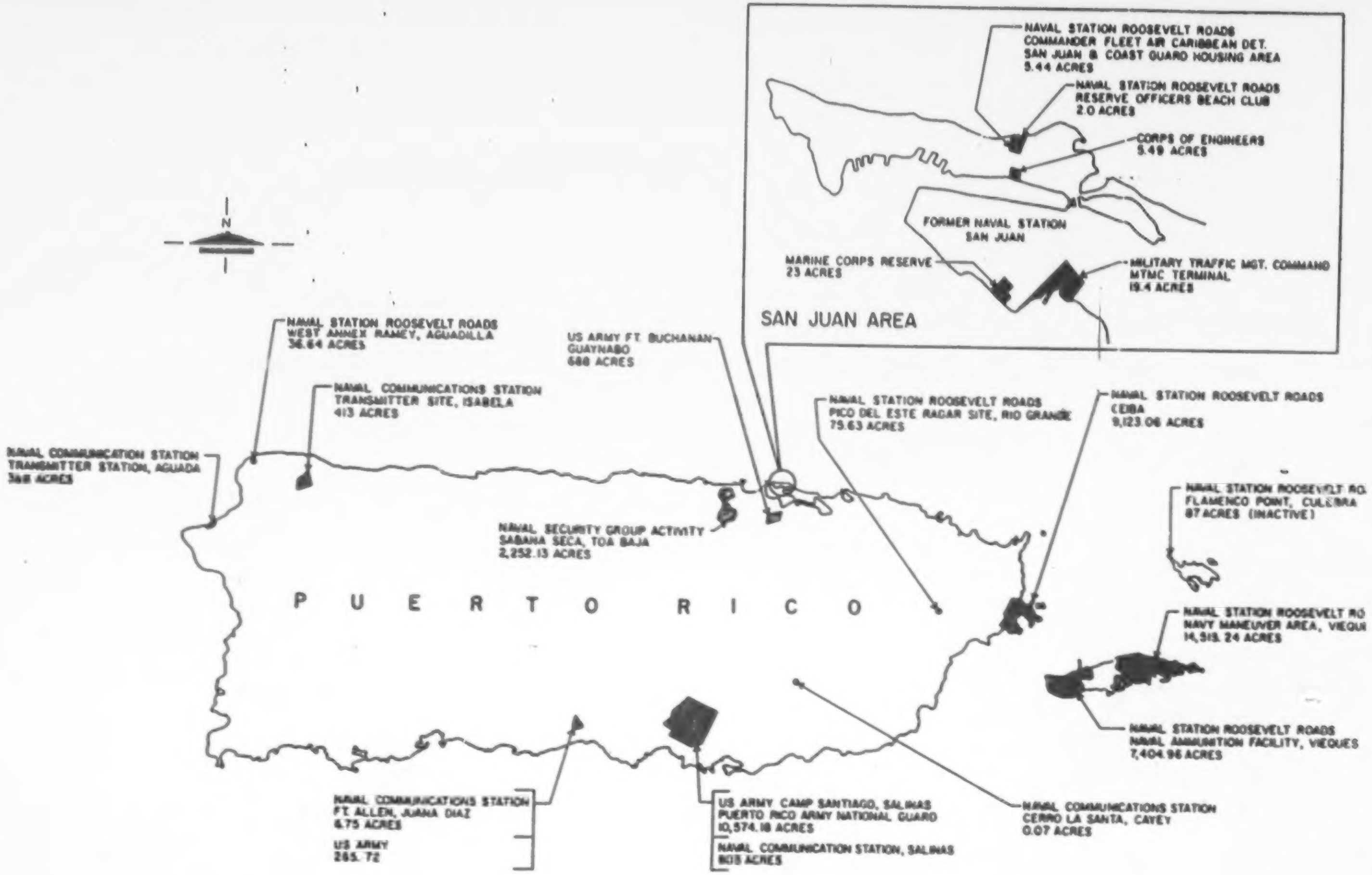
TITLE III OF S. 712 DETAILS THE INDEPENDENCE OPTION TO BE OFFERED TO THE PUERTO RICAN PEOPLE. THE DEPARTMENT OF DEFENSE FULLY SUPPORTS THE RIGHT OF THE PUERTO RICAN PEOPLE TO CHOOSE INDEPENDENCE, HOWEVER, TITLE III RAISES A NUMBER OF DEFENSE AND NATIONAL SECURITY RELATED ISSUES THAT MAY REQUIRE REVISION. SECTION 5.2 (A) OF TITLE III WOULD REQUIRE THE US TO COLLABORATE WITH PUERTO RICO "TOWARD THE ULTIMATE GOAL OF DISARMAMENT, PEACE, AND INTERNATIONAL RELATIONS BASED ON THE PRINCIPLES OF EQUALITY, MUTUAL RESPECT AND INTERDEPENDENCE." ADDITIONALLY THE US WOULD BE REQUIRED TO FORMALLY RECOGNIZE "THE RIGHT OF THE PEOPLE OF PUERTO RICO TO STRIVE TOWARD THE TOTAL

DEMILITARIZATION OF ITS TERRITORY." SECTION 5.2 (B) PROVIDES THAT "THE REPUBLIC OF PUERTO RICO SHALL BE CLOSED TO ANY AND ALL MILITARY FORCES OF FOREIGN NATIONS." THESE TWO PROVISIONS WOULD OF COURSE PRECLUDE U.S. RETENTION OR USE OF THE MAJOR FACILITIES WHICH WE WILL REQUIRE FOR THE FORESEEABLE FUTURE. I HAVE ALREADY MENTIONED THE STRATEGIC IMPORTANCE OF THOSE INSTALLATIONS. RELOCATING THEN WOULD INVOLVE ENORMOUS FINANCIAL EXPENDITURES, AND A DEGRADATION OF OUR MILITARY CAPABILITIES. WE WOULD NEED TO EXAMINE VERY CLOSELY THE PROVISION IN SECTION 5.2 (D) THAT THE REPUBLIC OF PUERTO RICO "SHALL BE A NUCLEAR FREE ZONE."

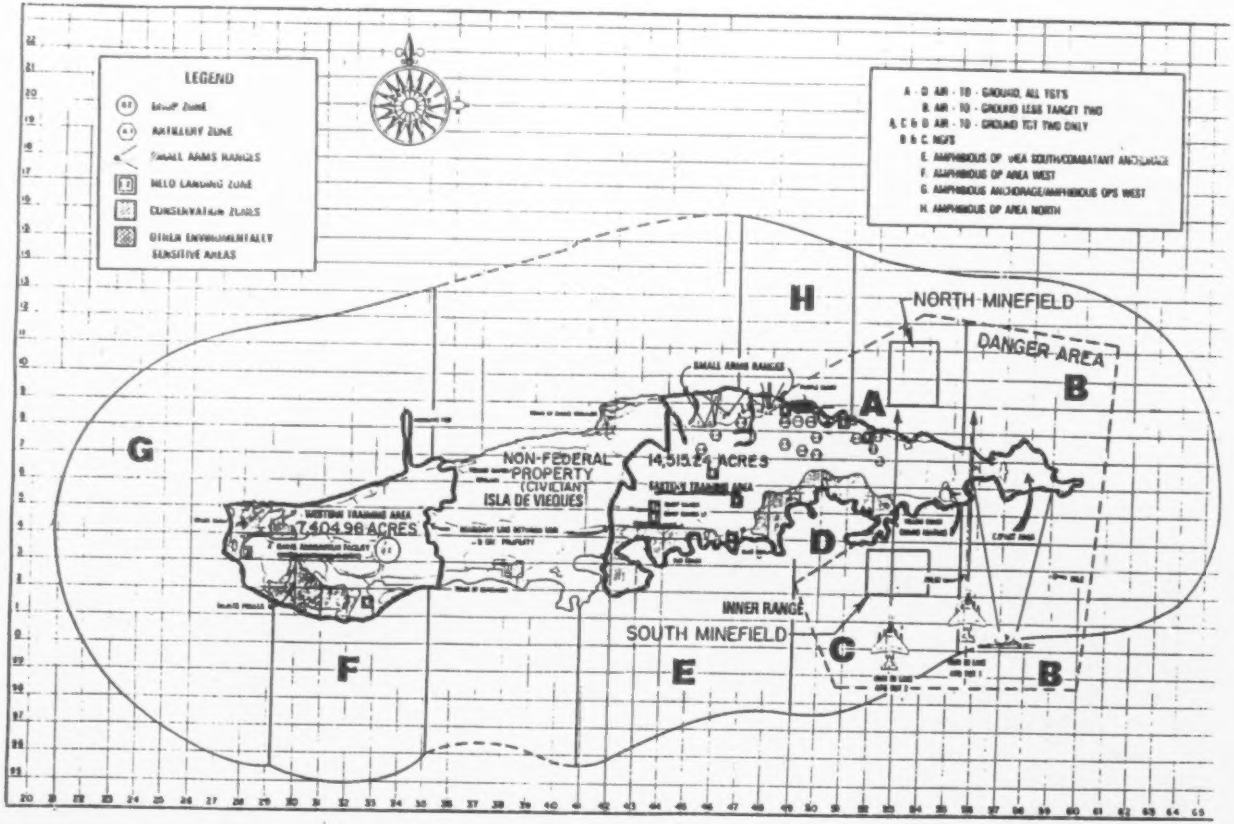
IN SUM, OF THE THREE ALTERNATIVES, THE INDEPENDENCE OPTION WOULD HAVE THE MOST SIGNIFICANT IMPLICATIONS FOR DOD. WE FULLY SUPPORT THE RIGHT OF THE PEOPLE OF PUERTO RICO TO CHOOSE THEIR POLITICAL STATUS, BUT UNDER ANY OPTION WE WOULD NEED TO RETAIN AND USE THE FACILITIES LISTED ABOVE. WE ARE LOOKING FORWARD TO WORKING WITH THE COMMITTEE TO RESOLVE ALL THE PROBLEMS IN THIS

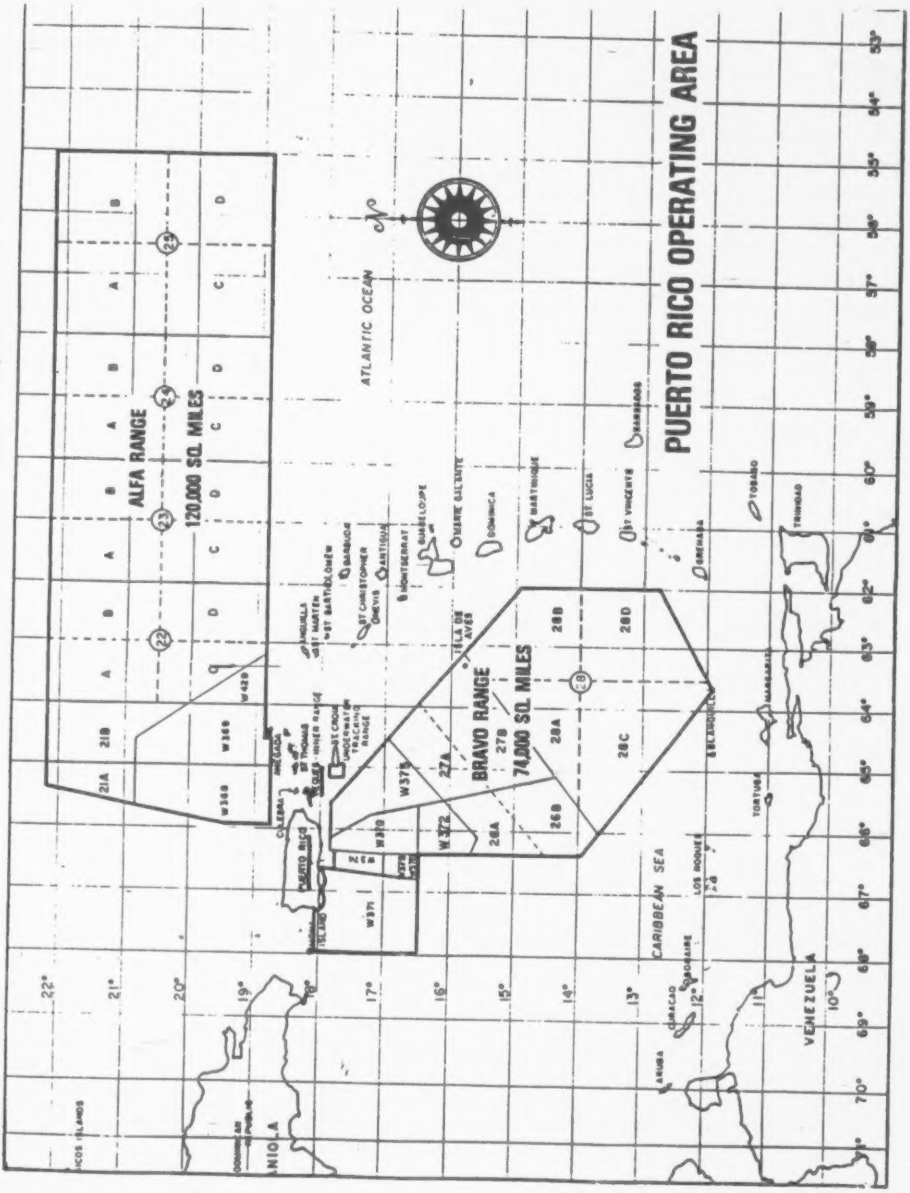
LEGISLATION IN ORDER TO CLEARLY DEFINE THE ISSUES AND DEVELOP REALISTIC AND WORKABLE OPTIONS FOR THE PEOPLE OF PUERTO RICO. MR. CHAIRMAN THANK YOU ONCE AGAIN FOR THE OPPORTUNITY TO APPEAR BEFORE THIS DISTINGUISHED COMMITTEE.

I WILL BE PLEASED TO ANSWER ANY QUESTIONS YOU MIGHT HAVE.


N
SAN JUAN AREA
NAVAL STATION ROOSEVELT ROADS
COMMANDER FLEET AIR CARIBBEAN DET.
SAN JUAN & COAST GUARD HOUSING AREA
5.44 ACRES
NAVAL STATION ROOSEVELT ROADS
RESERVE OFFICERS BEACH CLUB
2.0 ACRES
CORPS OF ENGINEERS
5.49 ACRES
FORMER NAVAL STATION
SAN JUAN
MARINE CORPS RESERVE
23 ACRES
MILITARY TRAFFIC MGT. COMMAND
MTMC TERMINAL
19.4 ACRES
NAVAL STATION ROOSEVELT ROADS
WEST ANNEX RAMEY, AGUADILLA
36.64 ACRES
US ARMY FT. BUCHANAN
GUAYNABO
688 ACRES
NAVAL COMMUNICATIONS STATION
TRANSMITTER SITE, ISABELA
413 ACRES
NAVAL COMMUNICATION STATION
TRANSMITTER STATION, AGUADA
348 ACRES
NAVAL STATION ROOSEVELT ROADS
PICO DEL ESTE RADAR SITE, RIO GRANDE
75.63 ACRES
NAVAL STATION ROOSEVELT ROADS
CEIBA
9,123.06 ACRES
NAVAL STATION ROOSEVELT RD.
FLAMENCO POINT, CULEBRA
87 ACRES (INACTIVE)
NAVAL SECURITY GROUP ACTIVITY
SABANA SECA, TOA BAJA
2,252.13 ACRES
PUERTO RICO
NAVAL STATION ROOSEVELT RD
NAVY MANEUVER AREA, VIEQU
14,515.24 ACRES
NAVAL STATION ROOSEVELT ROADS
NAVAL AMMUNITION FACILITY, VIEQUES
7,404.96 ACRES
NAVAL COMMUNICATIONS STATION
FT. ALLEN, JUANA DIAZ
6.75 ACRES
US ARMY
265.72
US ARMY CAMP SANTIAGO, SALINAS
PUERTO RICO ARMY NATIONAL GUARD
10,574.18 ACRES
NAVAL COMMUNICATION STATION, SALINAS
805 ACRES
NAVAL COMMUNICATIONS STATION
CERRO LA SANTA, CAYEY
0.07 ACRES

VIEQUES


LEGEND
DROP ZONE
ARTILLERY ZONE
SMALL ARMS RANGES
HELO LANDING ZONE
CONSERVATION ZONES
OTHER ENVIRONMENTALLY SENSITIVE AREAS
A - D AIR - TO - GROUND, ALL TGT'S
B AIR - TO - GROUND LESS TARGET TWO
A, C & D AIR - TO - GROUND TGT TWO ONLY
B & C NGFS
E. AMPHIBIOUS OP AREA SOUTH/COMBATANT ANCHORAGE
F. AMPHIBIOUS OP AREA WEST
G. AMPHIBIOUS ANCHORAGE/AMPHIBIOUS OPS WEST
H. AMPHIBIOUS OP AREA NORTH
H
NORTH MINEFIELD
DANGER AREA
B
A
SMALL ARMS RANGES
G
NON-FEDERAL PROPERTY (CIVILIAN)
ISLA DE VIEQUES
14,515.24 ACRES
WESTERN TRAINING AREA
7,404.98 ACRES
D
INNER RANGE
SOUTH MINEFIELD
C
B
F
E


PUERTO RICO OPERATING AREA
ALFA RANGE
120,000 SQ. MILES
BRAVO RANGE
74,000 SQ. MILES
ATLANTIC OCEAN
CARIBBEAN SEA
VENEZUELA
PUERTO RICO
21A
21B
22
23
24
25
A
B
C
D
W 368
W 369
W 420
W 370
W 371
W 372
W 375
26A
26B
27A
27B
28
28A
28B
28C
28D
CULEBRA
ST THOMAS
ST CROIX
UNDERWATER TRACKING RANGE
ANGUILLA
ST MARTEN
ST BARTHOLOMEW
BARBUDA
ST CHRISTOPHER
NEVIS
ANTIGUA
MONTSERRAT
GUADELOUPE
MARIE GALANTE
DOMINICA
ISLA DE AVES
MARTINIQUE
ST LUCIA
ST VINCENT
BARBADOS
GRENADA
TOBAGO
TRINIDAD
MARGARITA
TORTUGA
LOS ROQUES
BONAIRE
CURACAO
ARUBA
DOMINICAN REPUBLIC
HISPANIOLA
22°
21°
20°
19°
18°
17°
16°
15°
14°
13°
12°
11°
10°
70°
69°
68°
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62°
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60°
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56°
55°
54°
53°

The CHAIRMAN. General, let me interrupt you at that point. Senator McClure and I have read your statement, which will go into the record. And let me ask you a few key questions here before we hear from State.

It seems to me the principal questions on defense have to do with independence. These other matters can be easily worked out, do you not agree?

General BYRON. That is correct.

The CHAIRMAN. Now, with respect to independence, suppose we arrived at a proposal that said essentially this: that with respect to all needed bases and properties that the United States would continue to have the use of those to the same extent and under the same conditions that they are presently being used, that while the—while Puerto Rico would have the title to such lands, the use of those would be continued unless modified by mutual consent.

The question of renegotiation or of negotiations would occur periodically or at the request of either party, but that, again, the negotiations would change those rights only if agreed upon bilaterally, not unilaterally. And further, that we incorporate language of denial similar to that that we have used in the Federated States of Micronesia and Marshall Islands, et cetera.

It seems to me that that ought to be a formula that ought to satisfy both those who wish independence and the United States. Do you have any comment on that?

General BYRON. Yes, sir. Again, in our correspondence back with you we have carefully reviewed S. 712 within the context that you outlined. We have looked at the language that is contained in P.L. 99-239, which is the Micronesian Compacts for Free Association.

We do feel that that is one construct. Presently we have looked at it in the context of proposed draft language which is being coordinated within the interagency process at this time. But generally, it could be one viable construct which would basically serve both interests.

The CHAIRMAN. Well, it seems to me that that does serve the issue well.

Now, drafting this, the Department of Defense has got to make a few decisions and then follow up on those decisions quickly, which is to say, first of all, in the formula I just gave you I said all needed bases, which assumes that there are some unneeded bases, some unneeded properties. I think you have a list of those. We have had the briefing from you, and so you have to say what those are and when you would give those up.

Secondly, you must decide whether it is sufficient to simply have general language that says the United States would have the right to use all properties, all bases to the same extent and the same manner as is presently being done in perpetuity unless agreed to bilaterally. You have to decide whether that general language is sufficient, or whether you want to define the limits of certain bases by property description, and say you have the right to overfly here, land there, embark boats here—you know, all of the things in myriad detail, or whether you want something in the middle.

And as I say, we are planning on drawing up this bill, marking it up in July, starting probably next Wednesday. So, you know, if we report one that just says in about one paragraph we continue what we are doing until changed, if that does not pass muster, we should hear that rather quickly.

General BYRON. We are aware of that, and again, the main point that we—many of the language or the—the language in the legislation does impact on multiple agencies, and essentially we have got our thoughts on the matter out for coordination within the interagency process, and we should have that over to you shortly.

The CHAIRMAN. That is good. And my guess is we would want some general language, or at least my preference would be to have more general language in the language of the statute itself, and perhaps have attached maps or use zones or whatever.

Senator MCCLURE. Mr. Chairman, would you yield on that point?

The CHAIRMAN. Yes, certainly.

Senator MCCLURE. You have indicated that you have made your position known to other agencies for the interagency clearance process, and you hope to have that to us soon. It is my understanding you were requested on June the 5th to provide that language, and we do not have it yet. Can we have it by next Thursday?

General BYRON. I cannot guarantee the rapidity with which the interagency process works, but we will make it a point to try to get it over to you.

Senator MCCLURE. Would you provide to us no later than next Thursday, or by the close of business next Thursday, your own recommendation, regardless of whether it is cleared?

General BYRON. We will do that, sir.

Senator MCCLURE. Thank you very much.

The CHAIRMAN. That is a very good question.

Senator MCCLURE. That is Thursday of this week, not Thursday of next week.

The CHAIRMAN. We hate to put you on the spot.

General BYRON. You have probably terminated my career, but we will try. [Laughter.]

Senator MCCLURE. My own preference would be to be fairly general. The problem is you go to specifying all the things you do now, or that you think you have the right to do, and if you leave something out then—what is the rule of law that says, to enumerate certain things and leave out certain things means that what you leave out is not included, whereas if you do it in general terms you may not be stuck with that?

I mean, I am thinking we have the right, or we would expect to be able to land or stage out of Munoz Marine Airport, I would think, in the event of hostilities. That kind of thing might need to be stated, or not stated and of course the right to renegotiate here is—between sovereign nations the right to negotiate is a rather important right. I mean, it is not a merely right.

Panama was able, as an independent nation, to get us over the very strong opposition of many people to renegotiate that treaty and so to say that it can be changed only bilaterally would be still to give the new nation of Puerto Rico very important rights, and you will have some language on the denial?

General BYRON. Yes, sir. We will have the language on the strategic denial.

The **Chairman**. Is there anything else you can add at this point as to what ought to be or should not be in this part of the independence formula?

General **Byron**. I think with your intervention in the strategic denial principle that should be sufficient.

The **Chairman**. Senator McClure, did you want to ask the general any questions at this point?

Senator **McClure**. Yes, I would, Mr. Chairman. Is it the view of the Department of Defense that the defense rights can be legally secured by inclusion of appropriate language in S. 712, or would it require bilateral agreement between the U.S. and the Republic of Puerto Rico?

General **Bryon**. It is our view, sir, that a separate bilateral agreement would have to be concluded with the Republic of Puerto Rico after Puerto Rico attains its independence. As a matter of international law and practice, a newly independent country is free to make its own arrangements and is not bound by the rights of its former sovereign government. A recent example would be the Bahamas, where we have retained the use of facilities through an agreement concluded after the Bahamas secured their independence from the U.K. in 1973.

Senator **McClure**. It is your position that it has to be negotiated after independence? If a treaty is properly approached, then could it be negotiated between the time of the referendum and the proclamation of independence?

General **Bryon**. On the treaty, sir, I would have to defer back to the State Department representative on treaties, and again it would be speculative on my part to look at the timing of the thing and I defer to State on that.

Senator **McClure**. So the State Department may be prepared, I will also ask that question of you when we get to that point and also include in that question, in the consideration of the answer, the way in which we obtained permanent denial in the context of reassociation in Micronesia, to determine whether consistency has any virtue; and I assume, general, that your answer with respect to defense rights would attach also to the extensive off-shore operating areas adjacent to Puerto Rico.

General **Bryon**. We have reviewed—again, I know we have provided you maps of what is called the Puerto Rican operating area, and generally in terms of these training areas or operating areas they are in international waters, sir.

So again I do not think that we would have to have any particular legislative language to secure operating in these areas. They are in international waters and we have the right of innocent passage in that area. I can take that for the record and verify with our lawyers, but I do not think it pertains in this case.

Senator **McClure**. When you are talking about international waters, at what point from land—how far from land are you defining as international waters with respect to that?

General **Bryon**. I would have to look at the chart and see where they define the start of the thing, but I think it is out in the legal limits. But let me check.

Senator **McClure**. You can do that. Well——

General **Bryon**. We will do that for the record.

Senator McClure. If you can do that for the record. I want you to be very precise on that because we have both the three mile limit suggestion, the three league limit suggestion and the 200 mile Economic Enterprise Zone suggestion and I want to know which ones we are impacting.

General Bryon. Yes, sir. We will take that for the record.

Senator McClure. Thank you, Mr. Chairman.

[The information requested was not received.]

The Chairman. There are two pieces of property—the naval residence at Stop 7½ and the San Geronimo headquarters. We need to know in your report whether you have a need for these properties, or whether you are prepared to excess those under any of the options here.

General Bryon. Yes, sir. I am given to understand that the Stop 7½ has been declared excess by the GSA. There is a process that goes on when GSA gets involved, but checking with the Navy indicates that they have declared it excess.

The second piece of property, San Geronimo which you referred to, we understand that declaring it excess is in review and it is contingent upon agreement. There are negotiations going on now regarding an offset land transfer for Coast Guard housing.

San Geronimo is occupied by a Coast Guard BOQ. It used to be the old headquarters of the Caribbean Sea Frontier years and years ago and the Coast Guard is in there now, and again we are given to understand there are negotiations in process, looking for some offset land and at that stage of the game that would be declared excess contingent upon that offset, sir.

The Chairman. Senator McClure is suggesting to me that your recommendations to us be considered—that it be offered as an option to you that your recommendations be considered confidential unless cleared by the Administration.

I do not know how you can request that, but you may have that as an option if you wish.

Senator McClure. I do not want him to end his career yet.

General Bryon. I thank you very much, Senator.

Senator McClure. If you desire to submit it on that basis, I would be willing to consider it on that basis.

The Chairman. Oh, certainly as individual views. But we need those views, and we need them fast. Do we need any further testimony from the general this afternoon?

Senator McClure. No.

The Chairman. Thank you very much, General. We appreciate your testimony and we will do our best to see that you get another star instead of end where you are.

General Bryon. Thank you.

The Chairman. Ms. Mochary?

STATEMENT OF MARY V. MOCHARY, DEPARTMENT OF STATE PRINCIPAL DEPUTY LEGAL ADVISER, ACCOMPANIED BY DAVID COLSON, ASSISTANT LEGAL ADVISER, LATIN AMERICAN AFFAIRS

Ms. **Mochary**. I have submitted a longer version of my testimony for the record and if you will permit I have a somewhat shorter——

The **Chairman**. That is in the record.

Ms. **Mochary**. I am pleased to be here to give the views of the Department of State regarding the foreign policy implications of Senate bill 712, which would provide for referendum on the status of Puerto Rico.

Joining me at the table is Mr. David Colson, who is assistant legal adviser of the Department of State in charge of Latin American Affairs.

The Department of State's purpose is not to take a position as to the merits of the status options, but rather to point out those positions in S. 712 which pose significant questions and problems in the area of foreign policy, foreign relations and implementation.

Of great concern are those provisions which raise constitutional separation of powers issues and related questions of Federalism. I will address today the general bases of our concerns. These views are further set out at length in particularity in our written statement which I asked to be incorporated into the record and which you kindly agreed to.

Mr. Chairman, of the three options under consideration statehood poses the fewest foreign policy issues. Nonetheless, that provision which grants to Puerto Rico special use and jurisdiction over maritime resources raises substantial issues of national policy with potentially significant constitutional, international and trade policy implications.

This provision creates untenable distinctions between Puerto Rico and other states and places the United States in violation or potential violation of its international obligations.

Turning now to Title III, the proposal for independence, I would like to articulate some broad concerns. The most prominent problem raised under Title III is the extent to which U.S. foreign policy towards a new country would be determined by this bill rather than through the normal process of bilateral relations, including treaties and other international agreements.

As a matter of law, this is a basic constitutional separation of powers issue. As a matter of policy, any or all of the arrangements proposed in these sections may be premature. Furthermore, if S. 712 were to become law, it could not direct how an independent Puerto Rico would negotiate with the United States.

If there are issues we seek to protect in respect of an independent Puerto Rico, we should perhaps make that part of the arrangements leading to independence not something which is subject to future negotiation. In other words, it would appear prudent to resolve these issues pertaining to U.S. national security interests prior to independence.

The separation of powers problem arises most prominently under Section 6.1, which provides that all of the provisions of Title III be enshrined in a treaty of friendship and cooperation. A statutory requirement that there be a treaty on any subject runs afoul of Article II of the Constitution, which delegates treaty-making power to the President with the advice and consent of the Senate.

Moreover, there are many specific legal and policy problems inherent in some of the language of Title III. Of these, those related to our national defense posture are most problematic. The sections covering disarmament and demilitarization would lock the United States into pursuit of specific foreign policy objectives many of which are inconsistent with current policy.

Insofar as it would broadly and vaguely codify policy formulation, these measures clearly pose the separation of powers problem I spoke of earlier. Given the strategic importance of existing military installations and operations in Puerto Rico, it would be clearly contrary to our global military interests for us to legislate the exclusion of our military forces from Puerto Rican soil. Moreover, if these operations have to be relocated, it raises the specter of enormous financial expenditures.

The proposed legislative creation of one-way free trade, even if time constrained, would adversely affect the current international trade regime to which the U.S. subscribes. At a minimum, a waiver would have to be negotiated on the general agreement on tariffs and trade. USTR has made it clear that it is unlikely that such a waiver could be negotiated.

The bill also prohibits trade barriers on goods coming from Puerto Rico regardless of their ultimate point of origin. This provision would allow entry into the U.S. of products from any other country in the world so long as the goods were transshipped through Puerto Rico. This is a wholly unacceptable curtailment of Federal authority to regulate international trade.

Mr. Chairman, I want to turn next to the Enhanced Commonwealth Option. The proposal for an enhanced commonwealth detailed under Title IV of the bill would create an unprecedented political status for Puerto Rico. It would grant to Puerto Rico significant attributes of sovereignty which would be incompatible with remaining a part of the United States.

Many provisions require important transfers of authority from the Executive to the Puerto Rican Government. These new powers would extend well beyond those currently enjoyed by the Commonwealth of Puerto Rico or other nonfederated U.S. commonwealths and territories.

Many of these provisions addressed specifically in our prepared statement are open to attack on two different constitutional grounds: their impact on separation of powers as a result of legislative inroads on the Executive Branch prerogative over foreign policy, and their impact on federalism, owing this time to inroads by the Puerto Rican Commonwealth on this same area.

The Department objects to any delegation to another entity such as a state or territorial commonwealth of the authority vested in the Executive by the Constitution to conduct and oversee U.S. foreign relations. The Department does not agree to any language which implies a derogation of the President's power to negotiate for and represent the United States, including Puerto Rico, in the area of foreign relations.

Moreover, if Puerto Rico were given broader power, however limited, to conduct an independent foreign policy while remaining part of the United States, the functions and authorities of the Department of State and other Executive agencies with foreign operations and responsibilities, would be significantly impaired.

In this regard, the most objectionable sections of the bill are subparts 4(d) (i) and (ii), which respectively expand Puerto Rico's capacity to enter into so-called international agreements in its own name and authorize the governor of Puerto Rico to pursue an independent foreign policy.

Under our system of federalism and in keeping with the sovereignty of the United States it is the Federal Government which must be responsible for undertaking and implementing international obligations. Subpart (d)(ii) is particularly objectionable in its grant of broad and undefined power to the governor of Puerto Rico in this area.

Allowing a subentity of the United States to pursue its own foreign policy derogates the President's authority and raises obvious constitutional and political questions. We note in this regard that in respect of subparts 4(b) and (c), all laws touching on U.S. foreign relations including treaties and executive agreements should apply to Puerto Rico unless Puerto Rico is specifically exempted from those laws.

Other provisions of Title IV grant to Puerto Rico broad powers to make its own international air transport agreements, limited independent tariff authority, an effective right to participate in virtually all U.S. trade negotiations, broad authority over the administration of certain U.S. maritime affairs and coastal waters, a special regime for Puerto Rico in the area of intellectual property, and certain powers and special status in the administration of U.S. passports and visas. In all of these areas, countervailing constitutional principles of federalism and uniformity loom large and are compelling.

With respect to the issuance of U.S. passports and visas, these functions have been strictly relegated to the Department of State. The United States under no circumstances should cede its power to determine citizenship by the issuance of U.S. passports and to relegate and control its borders to any other authority.

Apart from constitutional concerns, there are foreign policy concerns and sound practical reasons for opposing these provisions so that control over the issuance of U.S. passports and immigration remains in the hands of a Federal authority. Chief among these are law enforcement interests and the need to promote the uniform issuance of passports.

A final matter of concern flowing from this bill is the likely impact it will have on U.S. positions in international organizations. Puerto Rico has a longstanding desire for greater freedom to participate in international organizations under its own auspices. The United States cannot cede greater freedom for participation in international organizations than Puerto Rico already enjoys. This participation is currently limited, subject to U.S. agreement, to observer status, associate status, or to U.S. delegation participation in approved organizations. This circumscribed participation has been carefully crafted over many years to maximize Puerto Rico's freedom without unacceptably compromising other U.S. objectives and prerogatives.

Finally, Mr. Chairman, I would like to note that the northern Marianas is also a commonwealth, and Guam is interested in commonwealth status as well. In considering changes in the commonwealth status of Puerto Rico, therefore, it is also necessary to consider the impact on other areas.

On the other hand, it should be emphasized that the status of the freely associated states, the federated states of Micronesia and the Marshall Islands, is completely different from anything which is proposed here for Puerto Rico.

The freely associated states are separate, sovereign countries which have chose to enter into association with the United States. Thus, unlike a commonwealth, the freely associated states are not part of the United States but rather are separate countries..

At the same time, however, as associated states they are in a form of political partnership with the United States involving reciprocal rights and responsibilities different from those we would have with a wholly independent country. The freely associated state arrangement, therefore, is not relevant to this legislation in its current form.

I want to conclude by reiterating what I said at the outset: that the State Department wishes to work with you to see legislation prepared which will give the people of Puerto Rico workable status options. We would welcome the opportunity to work with you in an effort to remedy these problems and produce a bill that both addresses the concerns of the Puerto Rican people while protecting the overall interests of the United States.

Thank you, Mr. Chairman.

[The prepared statement of Ms. Mochary follows:]

STATEMENT OF MARY V. MOCHARY
DEPARTMENT OF STATE PRINCIPAL DEPUTY LEGAL ADVISER
BEFORE THE
COMMITTEE ON ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE
WASHINGTON, D.C.
JULY 11, 1989

Mr. Chairman, distinguished Members of the Committee, Ladies and Gentlemen:

I am pleased to be here to give the views of the Department of State regarding the foreign policy implications of Senate Bill 712, which would provide for a referendum on the status of Puerto Rico.

The Department of State's purpose is not to take a position as to the merits of the three status options, but rather to point out those provisions in S.712 which pose significant questions and problems in the areas of foreign policy formulation and implementation.

Of great concern are those provisions which raise Constitutional separation-of-powers issues and related questions of federalism. I will address today the general and specific bases of our concerns.

Mr. Chairman. Of the three options under consideration, Statehood obviously poses the fewest foreign policy issues. Nonetheless, those provisions which grant to Puerto Rico special use and jurisdiction over maritime resources and which allow the new Puerto Rican state to continue to charge tariffs on coffee imports (including those from the continental U.S.) raise serious and substantial issues of national policy with potentially significant constitutional, international, and trade policy implications.

For example, Title II, Section 5(b) would grant the state of Puerto Rico rights that extend well beyond those enjoyed by any other state of the Union to explore, exploit, lease, possess, use and control the resources in the waters and seabed off its coast. In addition to creating a special regime for Puerto Rico not enjoyed by other states of the Union, this bill, despite the reservation clause, delegates the basic soverign rights and jurisdiction over the 200 mile Exclusive Economic Zone and continental shelf to Puerto Rico. This section is also vaguely drafted and is virtually guaranteed to engender disputes between Puerto Rico and the USG.

Such disputes could carry serious implications for both national security and U.S. foreign relations if, for example, Puerto Rico were to permit or not permit an activity on the continental shelf or EEZ that would otherwise be allowed or not allowed under international law and existing U.S. policy.

This unusual grant can also be expected to stimulate demands for similar autonomy from other states, including major offshore mineral producers such as Alaska, California and Louisiana. A delicate balance has been crafted over time between the Federal Government and states regarding rights in offshore minerals development. If the fabric of this equilibrium were to unravel, it could adversely affect the federal government's ability to assure continued flows of vital resources.

A technical problem we wish to note arising under Section 5(b) is that it refers to Puerto Rico as an "archipelago" in the geographical sense. Under Statehood, Puerto Rico would be precluded from being a legal archipelago by international law as reflected in the 1982 United Nations Convention on the Law of the Sea. Even if it were an independent country, Puerto Rico would not meet the legal definition of archipelago. An archipelagic state means a state "...constituted wholly by one or more archipelagos and may include other islands...". Improper application of the term has implications for the establishment of baselines from which offshore jurisdiction is determined and for the navigation regime applicable in the offshore waters, which could have adverse consequences for U.S. national security interests.

On trade considerations, the legislation allows the new Puerto Rican state to continue to charge tariffs on coffee imports, including those from the continental U.S. A tariff on coffee in Puerto Rico that differs from the one applicable in the other fifty states would be inconsistent with the International Coffee Agreement, would be difficult to manage and could create complicated problems for U.S. trade policy, especially in negotiating and joining future coffee agreements with economic provisions. Puerto Rico would not be the only state producing coffee -- Hawaii is also a coffee producer -- and allowing special rights for Puerto Rican coffee producers may lead to demands for similar treatment by other U.S. producers in addition to raising the constitutional issue of uniformity.

Turning now to Title III, the proposal for independence, I would like to articulate several broad concerns.

Mr Chairman. The most prominent problem raised under Title III is the extent to which U.S. foreign policy towards the new country would be pre-determined by this bill rather than through the normal process of bilateral relations, including treaties and other international agreements. As a matter of law, this is a basic Constitutional separation-of-powers issue. As a matter of policy, any or all of the arrangements proposed in these sections may be premature and presumptuous. Furthermore, if S.712 were to become law, it could not direct how an independent Puerto Rico should negotiate. It is not possible to predict with certitude the positions of an independent Puerto Rican Government with respect to the international political, economic and military interests of the United States. If there are U.S. interests we seek to protect in respect of an independent Puerto Rico, we should perhaps make that part of the arrangements leading to independence, not something which is subject to future negotiations. In other words, it would appear prudent to resolve issues pertaining to U.S. national security interests prior to independence.

The separation-of-powers problem arises most prominently under Section 6.1, which provides that all of the provisions of Title III be enshrined in a treaty of friendship and cooperation. A statutory requirement that there be a treaty on any subject runs afoul of Article II of the Constitution, which delegates treaty-making power to the President, with the advice and consent of the Senate. Moreover, there are many specific legal and policy problems inherent in some of the language of Title III. Title III embraces topics, such as nationality, currency and defense matters, which are far beyond the scope of existing U.S. treaties of friendship, commerce and navigation. Decisions on the scope of agreements and their subject matter need to be determined on a case by case basis. A number of separate detailed agreements may be required to properly address these issues.

Having articulated this broad concern, I want to now address those specific areas of Title III that the Department regards as problematic.

Section 2.6(b) provides for referral of disputes under the act to international arbitration. The United States should not, as a matter of policy, commit to a general open-ended arrangement which refers fundamental determinations of sovereignty to arbitration. Technically, and depending upon the circumstances, implementation of this provision could turn out to be at odds with our interests, national law, and the Constitution.

Section 5.1(k) provides that citizens of Puerto Rico may enter into, work, and establish residence as immigrants in the United States for a period of twenty-five years. This right is made expressly subject to nondiscriminatory limitations provided by U.S. law and regulations. The meaning of this limitation, however, is unclear. If it is intended to make U.S. immigration law in its entirety applicable to citizens of the Republic of Puerto Rico, then the entire provision would appear to be unnecessary. If, however, it is intended that certain limitations of U.S. immigration law are not to be applicable, or is intended to create free immigration from Puerto Rico to the United States, then we would have serious objections to this provision.

In the critical area of national defense, Section 5.2(a) of Title III establishes positions for the United States which cannot be condoned. It obligates the United States to collaborate with Puerto Rico "toward the ultimate goal of disarmament, peace, and international relations based on the principles of equality, mutual respect and interdependence." It further requires the United States formally to recognize "the right of the People of Puerto Rico to strive toward the total demilitarization of its territory". The language of 5.2(a) would lock the United States into pursuit of specific foreign policy objectives, not all of which may be consistent with policy. Insofar as it would broadly and vaguely codify policy formulation -- and here on the crucial issue of national security and defense -- this section clearly raises the separation-of-powers problem I spoke of earlier.

The language on demilitarization poses obvious policy difficulties and onerous technical problems. Section 5.2(b) provides that "the Republic of Puerto Rico shall be closed to any and all military forces of foreign nations." As drafted, that includes the United States. Owing to the strategic importance of existing military installations and operations in Puerto Rico, this provision is directly at odds with U.S. global military interests. Moreover, if these U.S. operations have to be relocated, it raises the spectre of enormous financial expenditures. Finally, Section 5.2(d) declares that the Republic of Puerto Rico "shall be a nuclear free zone." An unlimited commitment to a nuclear free zone for Puerto Rico would have strategic implications for hemispheric and global defense postures, and runs contrary to policy.

Title III would also have a major impact on international trade relationships. Section 5.3 imposes unilateral constraints on the formulation and implementation of U.S. trade policy. The legislative creation of one-way free trade, even if time constrained, would adversely affect the current international trade regime to which the U.S. subscribes. At a minimum, a waiver would have to be negotiated under the General Agreement on Tariffs and Trade, otherwise known as GATT; and, USTR has made clear the reasons why this is unlikely. Furthermore, this section provides a twenty year transition period for Puerto Rican firms without making any accommodation whatsoever for non-Puerto Rican U.S. firms with operations there. Finally, this section prohibits trade barriers on goods coming from Puerto Rico, regardless of their ultimate point of origin. This provision would allow entry into the U.S. of products from any other country in the world, so long as the goods were transshipped through Puerto Rico. This is a wholly unacceptable curtailment of Federal authority to regulate international trade.

Of course, the United States would look forward to establishing friendly and cooperative relations with an independent Republic of Puerto Rico. But those relations should form themselves over time, in a considered and careful manner, and take full account of all of the medium and long term interests of the United States and its sovereign prerogatives.

Mr. Chairman. I want to turn next to the Enhanced Commonwealth Option. The proposal for an enhanced commonwealth detailed under Title IV of the bill would create an unprecedented political status for Puerto Rico. It would grant to Puerto Rico significant attributes of sovereignty which would be incompatible with remaining a part of the United States. Many provisions require important transfers of authority from the Executive to the Puerto Rican Government. These new powers would extend well beyond those currently enjoyed by the Commonwealth of Puerto Rico or other non-federated U.S. commonwealths and territories.

These concerns are not immediately apparent from the face of the referendum proposition as stated in Subpart 2 of Title IV. The proposition defines itself on the premise of a common citizenship, and does not provide for any benefits to the citizens of Puerto Rico that would not be enjoyed by any other citizen of the United States. The spirit of equality inherent in that language, however, appears to be contradicted by many of the specific elements of the enhancement proposal.

Many of those provisions, to which I will turn in a moment, are open to attack on two important Constitutional grounds. The first is their impact on separation of powers as a result of legislative inroads on the Executive branch prerogative over foreign policy; and the second is their impact on federalism, owing this time to inroads by the Puerto Rican Commonwealth on this same area.

The separation-of-powers and federalism concerns are similar but distinct. By mandating a host of specific foreign policy outcomes, the bill makes inroads on areas assigned by the Constitution to the Executive. Separately, by ceding these areas to Puerto Rico, the bill commits to a political sub-entity subject matter that is and always has been relegated to the Federal Government.

The Department objects to any delegation to another entity, such as a state or territorial commonwealth, of the authority vested in the Executive by the Constitution to conduct and oversee U.S. foreign relations. The Department does not agree to any language which implies a derogation of the President's power to negotiate for and represent the United States, including Puerto Rico, in the area of foreign relations. Moreover, if Puerto Rico were given broader power (however limited) to conduct an independent foreign policy while remaining part of the United States, the functions and authorities of the Department of State and other Executive agencies with foreign operations and interests and responsibilities would be impaired.

To begin with, Subparts 4(b&c) of the bill create new limitations on the applicability of federal laws to Puerto Rico. In listing exceptions to these limits, the provision is ambiguous as to whether treaties and other international agreements are embraced within those federal laws which remain applicable. Subpart 4(b)(iv) indicates that a determination must be made, presumably on a case by case basis, as to which laws require uniform application. The Department maintains that all laws touching U.S. foreign relations, including treaties and executive agreements, should apply to Puerto Rico, unless Puerto Rico is specifically exempted from those laws.

Subpart 4(d)(i) expands Puerto Rico's capacity to enter into so-called international agreements in its own name. This provision should not be codified because it seeks to enlarge in unpredictable ways Puerto Rico's prerogative to enter into formal arrangements with foreign countries. As a matter of law, states or commonwealths of the United States do not have the power to enter into arrangements that rise to the level of "international agreements". Under our system of federalism, and in keeping with the sovereignty of the United States, it is the Federal Government which must be responsible for undertaking and implementing international obligations. Puerto Rico has in the past enjoyed some latitude in making certain very limited arrangements in its own name with certain countries, but the Department objects in principle to any further expansion of this latitude.

Subpart 4(d)(ii) authorizes the Governor of Puerto Rico to pursue an independent foreign policy. This provision is particularly objectionable in its grant of broad and undefined power to the Governor of Puerto Rico in this area. This power would be constrained only by a self-executing clause which weakly defers to active U.S. expressions of future imperilment. Allowing a sub-entity of the U.S. to pursue its own foreign policy raises obvious Constitutional and political questions, not to mention the practical problems posed with foreign governments if the President must disapprove an initiative taken with that government and the Governor of Puerto Rico.

Subpart 5 of Title IV grants Puerto Rico broad powers to make its own international air-transport agreements, including allowance of currently prohibited cabotage operations by foreign carriers between Puerto Rico and the U.S. mainland. This proviso would impinge on existing bilateral, and possibly multilateral, aviation agreements between the United States and other nations which specifically or implicitly include Puerto Rico. In effectively creating two separate negotiating authorities, this measure would inevitably complicate and conflict with the effective control of U.S. international aviation relations.

Subpart 7 of the Title grants limited independent tariff authority to the Puerto Rican government and legislates a role for Puerto Rico in U.S. trade negotiations. These provisions would require Puerto Rican participation in virtually all U.S. trade negotiations and obligate the President to consult with the Governor of Puerto Rico on any proposed tariff rate changes. The Department strongly objects, both in principle and in practice, to this extension of the Puerto Rican government's tarriff-setting authority, expecially when combined with the mandatory participation of Puerto Rico in negotiations which may have a major impact on the U.S. as a whole.

Subparts 8 & 9, which grant the Government of Puerto Rico broad authority over the administration of certain U.S. maritime affairs and coastal waters, pose some especially difficult conflicts between local and federal interests. Subpart 8 impinges directly on the authority of the Federal Maritime Commission to regulate U.S. domestic offshore trades, setting Puerto Rico apart from all other U.S. jurisdictions. This would likely lead other participants in U.S. offshore trade, such as Guam, to ask for similar authority.

The Department notes at least two other significant problems which would arise if Puerto Rico were to be granted offshore jurisdiction as proposed. One is that the U.S.-Venezuela Maritime Boundary Treaty would be called into question. The other is the overlapping of claims between areas under Puerto Rico's jurisdiction and under U.S. jurisdiction offshore the U.S. Virgin Islands.

Some of these maritime related problems might be amenable to language changes. At a minimum, these should include:

> (1) that Puerto Rico be required to honor the U.S.-Venezuela Maritime Boundary Treaty in the exercise of its jurisdiction;
>
> (2) that the boundary between the U.S. and Puerto Rican jurisdiction be established by Congress, (and not left to future negotiation) so as to support U.S. world-wide boundary positions (i.e., as an equidistant line giving full effect to all Puerto Rican and U.S. Virgin Island territory, including islands);
>
> (3) that Congress specify that the marine jurisdiction of Puerto Rico be exercised in a manner consistent with U.S. interpretation of international law;

(4) that the USG must otherwise wholly retain its authority to determine and insure compliance with international law; and

(5) that Puerto Rico would not have independent authority to negotiate its maritime boundary with the Dominican Republic and the United Kingdom (British Virgin Islands).

Subpart 10, which creates a new regime for Puerto Rico in the area of intellectual property, adds two new definitions to Section 101 of the U.S. Copyright law and discusses a category of works -- design of a useful article -- that is under great debate within the United States intellectual property community and for which there is as yet no domestic legislation. It would obviously be both premature and inappropriate for this contentious issue to be settled for the first time in legislation on the status of Puerto Rico. Further, it also sets certain exemptions and limitations for Puerto Rico under current law, including a term of protection and special exceptions for Puerto Rico which could raise national treatment questions with respect to U.S. obligations under the Berne Convention. Intellectual property is strictly a matter of Federal jurisdiction. Again, the Department regards it as inappropriate for Puerto Rico to have legislation in this area that goes so far beyond the scope of U.S. domestic law. Additionally, different provisions for Puerto Rican mask works could create problems for Puerto Rico in relation to the Semiconductor Chip Protection Act of 1984.

Subpart 16 grants special authority to the Government of Puerto Rico in the areas of passports and visas. Subsection (a), which would add the Governor of Puerto Rico to the list of officials to whom the Secretary may delegate passport issuing authority, is unnecessary, as the Secretary already possesses such power under 22 U.S.C. 211a.

Subsection (b), which requires the establishment of a passport office in Puerto Rico under the administration of the Governor, is objectionable in that it could conflict with the Secretary's sole authority to issue passports, depending on how the Governor's authority is construed. Any derogation of the Secretary's sole authority in this area is highly undesirable, as the integrity and uniformity of the document depend on issuance being administered by a single federal authority. This provision would also seem unnecessary in light of the fact that there is already a passport agency in Miami which provides passport services to U.S. citizens in those parts of the Carribean under U.S. administration.

Subsection (c), which authorizes the Government of Puerto Rico to permit entry of certain nonimmigrant aliens who do not have U.S. entry visas, is objectionable, since immigration authority, like passport issuance, should also remain under the sole administration of the federal government for law enforcement and other reasons.

Mr. Chairman, for the above reasons Subpart 16 should be wholly deleted from this bill.

Mr. Chairman. A final matter of concern flowing from this bill is the likely impact it will have on U.S. positions in international organizations. As a commonwealth, Puerto Rico would not be a separate sovereign entity in our federal system. As such, it would be ineligible under the terms and conditions of most international organizations for full membership. All of the United States' relationships with its various non-federated and unincorporated territories tend to come under intense scrutiny in international fora, where inconsistencies, whether perceived or real, can prove extremely troublesome. The direct impact of this legislation in organizations such as the United Nations will depend upon which option is finally chosen.

Puerto Rico has a long-standing desire for greater freedom to participate in international organizations under its own auspices. The enhanced commonwealth status provisions of S.712 provide for this. Nonetheless, so long as Puerto Rico enjoys a status less than that of independence, the United States cannot cede greater freedom for participation in international organizations than Puerto Rico already enjoys. This participation is currently limited, subject to U.S. agreement, to observer status, associate status, or to U.S. delegation participation in approved organizations. This circumscribed participation has been carefully crafted over many years to maximize Puerto Rico's freedom without unacceptably compromising other U.S. objectives and prerogatives.

Finally, Mr. Chairman, I would like to note that the Northern Marianas is also a Commonwealth, and Guam is interested in Commonwealth status as well. In considering changes in the Commonwealth status of Puerto Rico, therefore, it is also necessary to consider the impact on other areas. On the other hand, it should be emphasized that the status of the freely associated states -- the Federated States of Micronesia and the Marshall Islands -- is completely different from anything which is proposed here for Puerto Rico. The freely associated states are separate sovereign countries which have chosen to enter into association with the United States. Thus, unlike a Commonwealth, the freely associated states are not part of the United States but rather are separate countries. At the same time, however, as associated states they are in a form of political partnership with the United States, involving reciprocal rights and responsibilities different from those we would have with wholly independent countries. The freely associated state arrangements therefore are not relevant to this legislation in its current form.

Mr. Chairman, I want to conclude by reiterating what I said at the outset: that the State Department wishes to work with you to see legislation prepared which will give the people of Puerto Rico workable status options. We look forward to continuing our cooperative relationship with Puerto Rico in whichever form its citizens might choose. But the devil, as is so often the case, is in the details, and many of the details of S.712 could be devilish indeed. We would welcome the opportunity to work with you in an effort to remedy these problems and produce a bill that both addresses the concerns of the Puerto Rican people while protecting the overall interests of the United States.

The CHAIRMAN. Thank you very much.

One of our most difficult problems here is on the question of independence, with how you get an agreement which is—that is, this congressional act, which is, in effect, ratified by an election of the people, how you get that to rise to the dignity of a treaty, a binding agreement between two sovereign nations. Can you tell us how we can do that?

Ms. MOCHARY. Mr. Chairman, we believe that it is possible, after the referendum takes place and the independence is chosen, for a transition government to negotiate with the United States as an independent state—that is, as an independent country.

And that it is possible to negotiate agreements in that transition period which could be ratified prior to independence, and that those agreements would have full force and effect after independence as well.

The CHAIRMAN. Can it be done before—can it be negotiated before the referendum?

Ms. MOCHARY. Before the referendum takes place?

The CHAIRMAN. In other words, the United States does not want to negotiate independence, have it ratified with the referendum, and then say I'm sorry, we're going to go into confederation with Cuba and declare ourselves a rocket base over here. You know, what we said in the hearings is off now.

In other words, we want the declaration of independence to depend upon these defense arrangements, which is exactly what we had in the federal states of Micronesia. Before independence was ever declared, all these things were worked out. Can that be done here?

Ms. MOCHARY. We will certainly look into it, Mr. Chairman. If the referendum were to, in effect, ratify these agreements that were pre-negotiated, it is possible that they could be done. The problem is that when two independent states negotiate, somebody has to represent each state. And if the state does not exist or is not represented by an authority which is viewed as representing that state, then it is difficult to negotiate.

On the other hand, it seems to me that if agreements are ratified by a majority of the people, and then some provision is made for the fact that such ratification amounts to a binding ratification for international law purposes, we might be able to work something out.

The CHAIRMAN. It would seem to me that where you have a congressional act which sets up the three choices and the President signs it, and then the people of Puerto Rico vote on it and a majority of them approve independence, that it ought to be possible thereby, ipso facto, to have that rise to the status of a treaty.

I mean, it is better representative of the people's will it seems to me than one that is worked out by their President, for example, or some executive agreement. And I am no expert on international law on this particular point, but I do not see why that could not be binding.

Ms. MOCHARY. Well, there is a lot of logic to what you say, Mr. Chairman. However, before committing myself to a new theory of international law, I think we would like to have the opportunity to study that.

Senator McCLURE. Mr. Chairman, would you yield on that?

The CHAIRMAN. Certainly.

Senator McCLURE. Well, I had outlined here what you said on page three of your prepared statement—at the end of the first large paragraph you state that, "If there are U.S. interests we seek to protect in respect of an independent Puerto Rico, we should perhaps make part of the arrangement leading to independence, not something which is subject to future negotiations. In other words, it would appear prudent to resolve issues pertaining to U.S. national security interests prior to independence. '

I think that is what the Chairman is referring to and I jotted down a question to ask how do you do that?

Ms. MOCHARY. The question is when, prior to independence? The Chairman is suggesting that we negotiate those even prior to the referendum.

What I had in mind when I wrote—these words were written, was that it would be something that would be negotiated between the time of the referendum and the declaration of independence. So we will have to review the issue and see if it can be done even prior to independence. To the referendum, rather.

The CHAIRMAN. That is right.

Senator McCLURE. If you will yield further. From my own standpoint, you are not going to get the Congress of the United States to grant a blank check with respect to these issues, which it seems to me to be what is considered here.

If you talk about granting independence and then negotiating an agreement, how can they vote upon independent status if this particular issue is not resolved prior to the time they vote on it?

You are asking the people of Puerto Rico to accept a future event that conditions the kind of independence that they would be granted under this act. Is that not correct?

Ms. MOCHARY. Well, strange as it may seem, I think that is the norm—that independence comes first, and then the bilateral arrangements are negotiated afterwards.

Senator McCLURE. I understand what you are saying, but by granting independence to another nation—to another group of people to form another nation is not a usual international event. Tell me when else it has been done?

Ms. MOCHARY. Granting independence?

Senator McCLURE. Yes. It is not an every day event.

Ms. MOCHARY. The French and the British have done it quite often. There are many examples of historical examples.

Senator McCLURE. I understand that. But if you are asking the Congress to vote for this as an option, and then asking the Puerto Rican people to approve the option being given to them by the Congress, it seems to me that this is an essential part of the understanding to be arrived at between the people of Puerto Rico and the people of the United States.

And I do not see how either the Congress can make an informed decision on that issue, nor can the people of Puerto Rico make an informed decision on that issue unless it is resolved before they vote.

Ms. Mochary. Senator, you make a very good point, and we will look into it and try to make it possible under current international law.

The Chairman. Now, under the independence title, they provide for a whole group of machinery here about election of delegates to the constitutional convention, who shall be eligible to vote, the drafting of a constitution, certain guarantees that it shall have, the ratification—all of that.

Now, it seems to me that either we have the power—that if we have the power to do that—that is, to set up a legal framework which binds Puerto Rico to have a constitutional convention—in other words, that if ratified by the people, that binds them, that we could equally bind them on the question of defense rights. Because, surely, defense rights are no more important than the form of a constitution you shall have. Or it is of equal dignity.

If we do not have the right to do defense, then contrary wise, all we would have the right to do is give them independence and then that is it. And then whatever flows after that is whoever is makes a coup of the government, or whose got the loudest voice, or whatever. Is that not true?

Ms. Mochary. You make a very good point.

The Chairman. Well, I wish you would give us the answer to that because I think that—I mean I think it is sort of essential to get this defense matter settled, and, for the life of me, it looks reasonably clear, at least in logic. Maybe not in law. And it has got to have arisen before. I mean, I guess it arose with the Federal States of Micronesia. Maybe it has not been tested in the court of international justice, or wherever.

Well, I am just advised that since we were not sovereign over them the relationship was fundamentally different.

But, in any event, if you will take a look at that.

Now, on the question of issuing passports, do I gather that you have an objection to us requiring that you have a passport office in Puerto Rico, or is that only that the governor's office issue those passports?

Ms. Mochary. No. The objection is that the governor's office issue those passports. We believe very strongly that it is important to have the passport issuance function centralized.

The Chairman. Centralized—you do not mean in the United States?

Ms. Mochary. No. Centralized under the authority of the Secretary of State.

The Chairman. You would not have objection if we designated that you have a passport office in Puerto Rico?

Ms. Mochary. I would have no objection to that.

The Chairman. Because I think that is the concern here—that there is this inordinate delay. I think they have to go to Vermont, or whatever—Miami for passports. Vermont for visas. And that really ought—there ought to be somebody down there.

And by the way, that ought to be somebody appointed with prior consultation with the governor. I think the commonwealth people are exactly right in that you ought to, at least, have prior consultation in appointing someone.

Now, does State have any view on that?

Ms. Mochary. I have not consulted with the Secretary, but it seems to me that that would be a fair thing for us to do.

The Chairman. Good answer. Now, on this——

Senator McClure. Her career is not ended by that. [Laughter]

The Chairman. Well, that is a no.

On the question of the 200 mile exclusive economic zone on the continental shelf, do we not have the power to grant full or limited rights in this zone, aside from the question of whether it is a good idea—do we not have that power?

Ms. Mochary. You mean you, the Congress of the United States?

The Chairman. Yes.

Ms. Mochary. Yes. I guess you do.

The Chairman. But you talk about the uniformity on states coming in the union and that other states might—such as Louisiana and Texas, might ask for the same protection.

Well, actually, Louisiana did ask for the 10 mile, or 10 league—10 mile limit—10-and-a-half mile—three leagues, which is 10-and-a-half miles—the same protection that Texas and Florida on the Atlantic coast got in the Supreme Court. In that case, I believe it was Louisiana versus the U.S., we lost. We got only three miles, which we thought was rank discrimination.

But the Supreme Court has upheld the unequal treatment of states based on how they came in the union, which would indicate that we would have the right to grant more economic jurisdiction for Puerto Rico over these areas.

Ms. Mochary. I will have Mr. Colson, who is an expert on oceans law, answer that question.

Mr. Colson. Sir, I think there is no question that the Congress has the top legal power to make that determination. Aside from whether it is a good idea—I do not think we think it is a very good idea—there are some strong reasons for the United States as an entity, wanting to see the consistent application of United States' rights in the oceans off our coast, so that we have the opportunity to insist on a uniformity and reciprocal rights that other countries exercise off of their coasts.

And as you know, as a national government we have strong interest in the way that other governments exercise their ocean rights, and particularly, as it affects our national security interest. And, therefore, there is a high degree of concern within the government about the way that any particular entity of this government exercises the ocean rights.

And you know this issue, while the case that you referred to sprung out of cases that go back to the 1948 opinion that Justice Black rendered in U.S. v. California. And there he made it very clear of the national interest in the way that U.S. oceans rights are pursued in all of the areas off the United States coast, and the importance of having a national policy position.

The Chairman. Could we not draft this legislation to assure these national interests rights, and give to Puerto Rico the rest? I mean, can we do that as a practical matter—then I will discuss with you whether we should do it with the other rights. Can you identify what those national interest rights are?

Mr. Colson. The national interest would come in the area of how Puerto Rico exercises the marine jurisdiction that Congress would give and whether that would be applied consistently with the way the United States would exercise those rights in other areas off our coast.

There are—let me give you an example. A lot of states, perhaps your own, have interests in controlling the right to explore for shipwrecks, old shipwrecks in the areas off their coasts, but as a national government, we do not assert the right to control the expiration and exploration for shipwrecks off the coast of the United States on our continental shelf.

Now, were Puerto Rico to do that, while the national government is not doing that, it would drive a large wedge in U.S. ocean policy that would have some very strong implications for U.S. defense operations on the continental shelves around the world.

The CHAIRMAN. Can we not say ocean rights except for allowing somebody to recover shipwrecks?

Mr. COLSON. I think there are too many of those residual rights out there, Senator, for us to identify as to writing a list to say the excepts. I think that, at a minimum, what would be required is for the federal government to be able to step in and stop anything that the Puerto Ricans might be doing in the exercise of any marine jurisdiction that Congress might grant them.

The CHAIRMAN. Frankly, I have not studied the issue of what is out there in this economic zone and why it is an issue at all and what is—I really have not looked at the question of how wide the shelf is. I think in the Puerto Rican trench, there is not much you can do except float on top of it. But I wish you would take a look at that. I mean there is—to the extent it is valuable.

But see, the issue arises because, for example, unlike Alaska, where we could give the Alaskans the right to get 90 percent of the oil in Prudhoe Bay, we do not have—they do not have oil on the island and they do not have many other resources. And there may be something in the ocean there that is of value which properly could be developed by Puerto Rico. And it seems to me if we do not have any national interest in it, we ought to at least explore whether that can be done.

And I think, as a legal matter, it could be drafted—perhaps we do not put all the things they cannot do. We narrowly define what they can do, limited to certain economic things and subject to some veto if it interferes with national rights. I mean, there has got to be a way to draft it.

And I wish you would take a look at that and give us your advice on whether we can do that.

Another reason is that the federal government does not manage those resources. It costs too much to do it, so why should the local people not do it, if the federal government is not—particularly fisheries.

Mr. COLSON. Well, sir, there is—there would probably be some people in the federal government that would say that we are trying to manage the fishery resources. There is a Carribean Regional Fishery Management Council that is established under the Magnuson Act. Puerto Rico is represented on that council.

These are things, though, that I am sure that myself and others in the administration would be happy to try to sit down and work out something with you that would appear reasonable in this context.

The CHAIRMAN. Well, why do we not do that and do it soon? Again, keeping an eye on the clock here, because it is almost the clock between now and the time when we go into a markup on the legislation.

I do not know whether it is a matter of sufficient value really to put it in here. I suspect it is—otherwise it would not be in this draft. That would—it would be a matter that would come up under both statehood and commonwealth. So you might take a look at that.

Could you tell us—what are your specific objections to a free immigration provision?

Ms. MOCHARY. Our objections have to do with control of immigration to the United States under independence, or free emigration from Puerto Rico to the United States. Is that it? Yes, that the normal provisions of our immigration law are not in any way recognized in the free immigration provisions. That is, the normal bases for exclusion have not been recognized at all in this provision.

In fact, in order to make it workable I think you would have to revise U.S. immigration law.

The CHAIRMAN. In your statement, you talked about Puerto Rico's participation in international agreements as observer status only. Is that correct, and have you come into any problems—have you discovered any problems with respect to that in the past?

Ms. MOCHARY. We have over the years fashioned arrangements which are certainly satisfactory to the United States and we hope are satisfactory to Puerto Rico in terms of the amount of participation that they have in international organizations.

The CHAIRMAN. What are those?

Ms. MOCHARY. Depending on the organization, it can be either observer status or involvement in the delegation. It varies with the different organizations.

The CHAIRMAN. Have you run into any problems at all on that?

Ms. MOCHARY. No, no specific problems that I know of, sir. But what I was trying to say is that we, the United States, are satisfied with the arrangements that we have now and we would think that, for instance trying to secure for Puerto Rico a place—voting rights—in the United Nations would be inappropriate.

The CHAIRMAN. Senator McClure?

Senator MCCLURE. Thank you, Mr. Chairman. To what extent do you believe that U.N. resolutions 1514 and 1541 apply to Puerto Rico?

Ms. MOCHARY. Our consistent position since the first plebiscite has been that Puerto Rico has attained self determination and in fact we have not reported on Puerto Rico because we have taken the consistent position that they have attained self determination.

Senator MCCLURE. With respect to a vote to be held by the people of Puerto Rico, is it your view that we must comply with U.S. domestic law with respect to qualification of voters, or do we have to comply with the expectations, if not the rules and regulations, of the United Nations?

Ms. MOCHARY. It seems to me that if we comply with the rules and regulations of the United States that we will certainly be in compliance with the expectations of the United Nations.

Senator McCLURE. That is somewhat different, however. Let me separate this question from the previous comment because I do not want to imply that this is a difference.

What is your view with respect to the right of people of Puerto Rican ancestry who are nonresidents of Puerto Rico to participate in this election?

Ms. MOCHARY. I do not know the answer to that.

Senator McCLURE. Would you supply it for the record?

Ms. MOCHARY. Yes, we certainly will.

Senator McCLURE. On page 2 of your statement you are speaking of the Section 5(b) would grant the State of Puerto Rico rights that extend well beyond those enjoyed by any other state.

You say in the first full paragraph on the page, that that is an unusual grant. That there is a delicate balance that has been crafted, and in the last sentence you state:

> If the fabric of this equilibrium were to unravel it could adversely affect the Federal Government's ability to assure continued flows of vital resources.

In view of the willingness of the Congress of the United States and of the Executive to engage in self-imposed moratoria with respect to Federal areas, why do you assume that a transfer of resources to a state would interrupt the flow of resources?

Ms. MOCHARY. Senator, I was referring here to the very issues that Mr. Colson spoke about earlier.

Senator McCLURE. What flow of resources would be interrupted if the state operated? For instance, if California had won the lawsuit with respect to the territorial waters off California they would probably be drilling in the Santa Barbara channel today. Is that not correct? They are operating very freely within the three-mile limit, are they not?

Mr. COLSON. Sir, I am not going to try to speak for California oil and gas activities and laws. I really do not know what they are doing.

Senator McCLURE. Let me state for the record that they are drilling very freely and operating very freely within the three-mile limit and yet there is a moratorium on Federal activities beyond the three-mile limit. Maybe if we let California have the option of development of those resources they would see an economic reason to do so, where today they do not.

Would we not, if we really want to have a flow of those resources assured, be better of to turn it over to the state rather than preserve it to the Federal Government?

Mr. COLSON. Sir, you have an interesting perspective on this point and you may well be right. I do not know.

Senator McCLURE. Thank you. You state that the proposed retention of Puerto Rico's tariff on foreign coffee would violate the international coffee agreement under statehood. Given that Puerto Rico is presently within the customs territory of the United States, why does this provision not already violate that agreement?

Ms. MOCHARY. My understanding is there is a special exception for Puerto Rico.

Senator McCLURE. If that is true, could there not be a special exception for Puerto Rico under statehood?

Ms. MOCHARY. It is unlikely that that could be negotiated. My understanding is that the exception is not something that the United States created, but it is an exception in the coffee agreement. That is an agreement which we have entered into with other countries.

Senator McCLURE. But other countries have agreed to give Puerto Rico a special exception.

Ms. MOCHARY. Because of their special status now.

Senator McCLURE. But they would not do so if they were a state?

Ms. MOCHARY. That is my understanding from the Trade Representative. They will testify on that issue. It is a very complicated question—the status of the coffee tariffs—and we would like to defer to the U.S. Trade Representative on that question.

Senator McCLURE. You have indicated your objections to certain trade provisions under independence, yet you have not mentioned any concern over whether continuation of Section 936 might trigger tax-sparing agreements with other nations. Do you have such a concern?

Ms. MOCHARY. That is a question that we have looked into and there are a variety of opinions on that. On the face of the tax-bearing agreements that we have with other countries that have most-favored-nation clauses, it would seem that the most-favored-nation clause would be triggered. However, there is a practical aspect of this. That is, that it cannot be foreseen that independence would happen overnight.

There has to be a transitional period and it is quite possible that we could get the agreement of our treaty partners in these tax-bearing agreements to recognize that the treatment that is being given Puerto Rico is just a transitional treatment and not the kind that was foreseen under the most-favored-nation clause. So that issue has not yet been settled.

Senator McCLURE. Is your objection to subpart 5 with respect to air transport based on Puerto Rico conducting international aviation discussions, or is it on the basis of a possible impact of such discussions on domestic airlines?

Ms. MOCHARY. The State Department's problem, of course, is with the foreign relations aspect of it. That is, the international negotiations. However, it also impacts on the rights and other countries' rights under existing international agreements.

Senator McCLURE. To what extent would such authority, if granted Puerto Rico, limit the U.S. ability to negotiate air rights agreements with respect to other U.S. ports? Does it necessarily affect it, or does it just complicate the negotiations?

Ms. MOCHARY. It certainly complicates it, and how it complicates it—and we do not know whether it will affect it until we see how other nations, negotiating partners, will react. I mean, they could react in a way which would create adverse consequences to the United States or they could react in a more mild fashion. It is hard to predict these reactions.

Senator McCLURE. With respect to maritime jurisdiction, it appears that the Department supports maritime jurisdiction with amendments under the commonwealth option but not under statehood. Is that correct?

Mr. COLSON. I think we were commenting specifically on the way that S. 712 was drafted. It was not clear in the draft of that bill, in the Enhanced Commonwealth, that the Enhanced Commonwealth of Puerto Rico would be given by the Congress marine resource jurisdiction in the 200 mile zone off of Puerto Rico. It just exempts Federal jurisdiction. It does not create new jurisdiction.

Our preference, again, would be to keep this a matter of Federal jurisdiction and try to work out specific concerns that the Puerto Ricans might have.

But we did note specific problems that we see if the Congress does decide that jurisdiction should be granted to Puerto Rico in these areas and as we noted there, there are maritime boundary agreements that the United States has already entered into with Venezuela, for instance, that we would want to see honored by Puerto Rico's exercise of jurisdiction were that to occur.

We would then be creating marine jurisdiction between the United States Virgin Islands and Puerto Rico. There are boundary issues with the Dominican Republic and with the British Virgin Islands that are also implicated and we would need to consider how we would handle those if that were to be the judgment of the ultimate bill.

Senator MCCLURE. But it is my understanding, with those exceptions, those specific concerns that you might wish to address, you do not object to the grant of jurisdiction under commonwealth status?

Mr. COLSON. We have not objected to it.

Senator MCCLURE. But you do object to it under statehood?

Mr. COLSON. Yes.

Senator MCCLURE. If that is true and extended jurisdiction were granted to the Commonwealth of Puerto Rico and they should later decide to opt for statehood, would they then be required as a condition of statehood to relinquish the off-shore jurisdiction which they gained as a commonwealth?

Mr. COLSON. You are asking me to predict what we might think a few years from now, sir. The tradition of states entering the Union has been, as was pointed out earlier, for the state to come into the Union with the marine resource jurisdiction that was presently utilized, or presently had at that time. That is the tradition.

Whether whoever might be in our seats when the situation you have posited occurs was to say we were not going to follow U.S. tradition at that point, they would have to carry the burden I suppose.

Senator MCCLURE. But you might in the future grant them greater authority than you are willing to grant them now?

Mr. COLSON. Yes, sir. That would be the result of that.

Senator MCCLURE. That is the way I interpret your answer. Does the Department take the same approach with respect to Puerto Rico's current three-league jurisdiction on submerged lands?

Mr. COLSON. We supported the legislation, sir, that granted Puerto Rico three marine leagues jurisdiction.

Senator MCCLURE. If they elect statehood, in this instance are you then taking that support away?

Mr. COLSON. No, sir.

Senator McClure. You would then support the three-league jurisdiction under statehood?

Mr. Colson. That they presently have, yes, sir.

Senator McClure. That they presently have?

Mr. Colson. Yes, sir.

Senator McClure. I am going to ask this question because it is a serious one. You have made certain recommendations to date both before and in your testimony here. Would you, by the close of business on Friday, provide the Committee with specific language to implement all of the recommendations made by the State Department this afternoon, and specifically would you provide language on maritime jurisdiction which would work under both the statehood and commonwealth options?

The Chairman. That is a joint request from us.

Ms. Mochary. We will certainly try.

Senator McClure. Thank you very much.

The Chairman. We would also like your advice on this transition on independence. Looking at the draft given by the Independence Party, they provide for a Constitutional Convention but they do not say what happens between the referendum and the Constitutional Convention—I mean, between the proclamation of independence.

It seems to me that the constituted government there should continue to have day-to-day powers, certain powers of public order and peace and all of the things that they do. I wish you would give us your advice on what they can do and should do.

It seems to me that we ought to have—assuming that we can answer this question that says that the referendum gives this agreement, bilateral treaty, dignity, then we ought to provide ipso facto for independence; because this status that says you are not independent and you are not under U.S. jurisdiction is unsatisfactory. I mean, it ought to be one or the other.

Certainly there will be some hybrid rights. There will be continuing duties of the United States we discussed this morning, duties during the transition period to continue to give services and that sort of thing, but we ought to set forth precisely what the continuing duties of the government are up to the time you have an elected—a new constitution and new elected officials, and I wish you would give us your advice on that. I am sure that the Independence Party will as well. That ought to be enough work for you between now and Friday.

Thank you very much, Ms. Mochary. You have been very helpful. We appreciate your testimony.

Senator McClure. Mr. Chairman, before closing the hearing, I might note that we have hearings also on Thursday and Friday, and while we are making requests of those who appear before us here today to have certain language to us by close of business on Thursday or close of business on Friday, we ought to at least let the others who are going to appear on Thursday and Friday of this week, let them know now that we are going to make similar requests of them to have specific language proposals to us.

The Chairman. That is an excellent idea and I wish those who are going to participate on Thursday and Friday would have that information for us. I think the outline of the questions is reasonably clear. We asked this morning for all of the information of the cost of the various programs.

We ask that to Mr. Dennis, coordinating for the other agencies. But clearly, each agency should—particularly Treasury—should have the cost of 936, the cost of Medicare, et cetera, in writing if we can have all of those costs in addition to the other anticipated questions.

The CHAIRMAN. So with that, the Committee will be in recess until Thursday, July 13, at 10 a.m.

[Whereupon, at 4:25 p.m. the hearing recessed, to reconvene Thursday, July 13, 1989.]

[Subsequent to the hearings the Department of State submitted the following responses to additional questions:]

United States Department of State

Washington, D.C. 20520

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AUG 3 1989

Dear Mr. Chairman:

In your letter of July 18, 1989 to Deputy Legal Adviser Mary Mochary you requested the Department of State's comments for the record on a number of questions in relation to S.712.

I am pleased to enclose an attachment which contains our comments.

Sincerely,

Janet G. Mullins

Janet G. Mullins
Assistant Secretary
Legislative Affairs

Enclosure: As stated.

The Honorable
J. Bennett Johnston,
Committee on Energy and Natural Resources,
United States Senate.

STATE DEPARTMENT RESPONSES
TO QUESTIONS SUBMITTED FOR THE RECORD
July 11, 1989

Q: To what extent do you believe that U.N. Resolutions 1514 and 1541 apply to Puerto Rico?

A: U.N. Resolution 1514 (XV), adopted by the U.N. General Assembly on December 14, 1960, proclaims that colonialism in all its forms and manifestations must come to an end, and declares that "all peoples have the right of self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

The people of Puerto Rico, like all other peoples, have the right of self-determination recognized in the U.N Charter and affirmed in Resolution 1514. The 1991 plebiscite will allow the people of Puerto Rico to exercise their right of self-determination once again, just as they did in 1952 when they chose their present political status, and in 1967 when they reaffirmed that choice. As the United Nations has repeatedly recognized, both in general and with respect to Puerto Rico, such plebiscites are among the primary means by which the freely expressed wishes of a people may be ascertained.

U.N. Resolution 1541 (XV), adopted by the U.N. General Assembly on December 15, 1960, approves a set of principles to guide Members in determining whether they have an obligation to transmit annual reports to the United Nations under Article 73(e) of the U.N. Charter on their administration of non-self-governing territories.

Puerto Rico is not a non-self-governing territory, a fact which the United Nations has repeatedly recognized for more than 35 years. Shortly after the creation of the United Nations in 1945, the United States voluntarily placed Puerto Rico on the United Nations list of non-self-governing territories, and transmitted annual reports to the Organization under Article 73(e). In recognition of the 1952 plebiscite in which the people of Puerto Rico approved the establishment of the Commonwealth of Puerto Rico, however, the U.N. General Assembly adopted Resolution 748 (VIII) on November 27, 1953, removing Puerto Rico from the list of non-self-governing territories.

In recent years, Cuba has attempted to revive United Nations consideration of Puerto Rico. In 1982, the U.N. General Assembly rejected such an effort by voting overwhelmingly against a proposal to inscribe the question of Puerto Rico on its agenda. Since then, Cuba has sponsored resolutions in the U.N. Committee of 24, a subcommittee of the Fourth (Decolonization) Committee of the General Assembly, that "reaffirm" Puerto Rico's right to independence. The Fourth Committee has refused, however, to refer such resolutions to the General Assembly.

The fact that another plebiscite will take place does not change the fact that the people of Puerto Rico continue to have the right freely to determine the status of Puerto Rico.

Q: Do you believe that the self-executing nature of S. 712 satisfies any requirements of international law with respect to the process of self-determination?

A: The Department of State considers that S. 712, in establishing the framework for a 1991 plebiscite in which the people of Puerto Rico will choose their future status, satisfies international law requirements pertaining to the process of self-determination.

The right of self-determination, as recognized in international law, rests on the ability of a people freely to choose their political status and their form of government. The right of self-determination thus provides the foundation for government by the consent of the governed. The 1991 plebiscite will allow the people of Puerto Rico to exercise their right of self-determination once again, as they did in their plebiscites of 1952 and 1967. As the United Nations has repeatedly recognized, both in general and with respect to Puerto Rico, such plebiscites are among the primary means by which the freely expressed wishes of a people may be ascertained.

International law does not require that exercise of the right of self-determination must result in independence. Rather, a people may freely choose another political status, such as full integration with an existing country, or, as the people of Puerto Rico have previously chosen, commonwealth status.

Q: Your statement indicates that the grant of jurisdiction over offshore resources would stimulate similar demands from other states. Congress has previously granted Puerto Rico three-league jurisdiction. Are you aware of any effort by any coastal state to seek similar jurisdiction based on that action?

A: The states have, of course, litigated the question of the extent of their jurisdiction under the Outer Continental Shelf Lands Act on a number of cases. The Department is not aware of any case where a state has argued for an entitlement based on the grant to Puerto Rico of three-league jurisdiction.

Q: You indicate that a transfer of jurisdiction could adversely affect the federal government's ability to assure continued flows of vital resources. Given the executive branch's willingness to engage in self-imposed moratoria with respect to federal areas, why do you assume that a transfer of resources to a state would interrupt the flow of resources.?

A: If offshore resources are controlled by the federal government, U.S. policy in that respect can be implemented consistent with the national interest, whether it be a moratorium or full scale exploitation. If these resources are controlled by state governments, there is no assurance how they will be managed and utilized.

Q: Assuming that the usufruct requested under the statehood option were made consistent with federal policy with respect to activities, would this provision be acceptable? And would you provide the necessary language to ensure such compatibility?

A: As a matter of principle the Department cannot support the state of Puerto Rico exercising its own 200 mile zone jurisdiction. The Department has provided the Office of Management and the Budget with the Department's textual suggestions for S.712 which would implement the Department's July 11 testimony.

Question: You state that the proposed retention of Puerto Rico's tariff on foreign coffee would violate international coffee agreeement under statehood. Given that Puerto Rico is presently within the Customs territory of the U.S., why doesn't this provision already violate that agreement?

Answer: It is not the position of the United States that the retention of a differential coffee tariff by a Puerto Rican state would violate substantive obligations imposed by the International Coffee Agreement (ICA). Members of the ICA, however, also have pledged to pursue a number of shared objectives, including, inter alia, increasing trade in coffee and promoting international cooperation in connection with world coffee problems. Article 1. U.S. membership in the ICA implies an obligation on our part to ensure that actions arguably inconsistent with the spirit of the agreement are not undertaken by states. The U.S. currently cannot be held to the same level of obligation with respect to territories currently enjoying special legal status, such as Puerto Rico. Were Puerto Rico to become a state, this justification for its differing coffee tariff would not be available.

Q: What are your specific objections to a free immigration provision?

A: The Department of State objects to a free immigration provision for foreign policy and national security reasons. Under the Immigration and Nationality Act (INA), certain categories of aliens are ineligible to enter the United States (e.g., terrorists, narcotics traffickers, persons with dangerous diseases, etc.). Completely free immigration would permit any aliens whom the Republic of Puerto Rico documents as its citizens to enter the United States, even if they fell into one of the categories of aliens who would otherwise be inelgible to enter the United States.

The Department notes that section 5.1(k) would subject immigration by Puerto Rican citizens into the United States to "nondiscriminatory limitations" provided under U.S. law. As the term "nondiscriminatory limitations" is ambiguous, however, it is not clear whether the bill would be establishing a completely free immigration system which would exempt Puerto Rican citizens from the exclusionary provisions of the INA.

Q: What effect would such an immigration provision have on U.S. quotas from the region?

A: Under current law, there are no immigration quotas, but rather a system of world-wide numerical limitations and an annual per-country limitation. Assuming that free immigration from Puerto Rico were outside of these limitations, there would be no effect on immigration levels from other countries of the region or anywhere else in the world.

If, however, immigration from Puerto Rico was counted against the annual world-wide ceiling on immigration, the number of visas available to immigrants from the rest of the world in a given year would be reduced by the number of immigrant visas used by citizens of the Republic of Puerto Rico in that year. Thus, if the number of visas used by citizens of Puerto Rico were quite large, there would be an equally large reduction in the number of immigrant visas available for the rest of the world, thereby exacerbating immigrant visa backlogs. It should be noted, however, that if immigration from Puerto Rico were subject to the annual per-country limitation, the number of immigrant visas used by Puerto Rico in a given year, and consequently the reduction in the number of numerically limited immigrant visas available to the rest of the world, would never exceed 20,000.

Q: Is the concern of the State Department with respect to the foreclosure of Puerto Rico to military forces the effect on existing military installations or the financial cost of relocating such facilities.

A: The Department is concerned about both elements of the problem. U.S. bases in Puerto Rico serve important national security purposes.

Q: Should the U.S. require the same type of permanent strategic denial as was obtained under the Compacts of Free Association with Micronesia?

A: The Department believes that in the light of the benefits that would be bestowed upon an independent Puerto Rico by the United States under S.712, and U.S. national security requirements, it is appropriate to require the same type of permanent strategic denial as was obtained under the Compact of Free Association.

Q: You would object to one-way free trade based on the requirements of GATT. Would the Administration object to an expression of Congressional willingness to support a mutual free trade arrangement similar to that with Canada, if the President and the head of the new Republic were to negotiate such an arrangement?

What specific trade arrangements should apply to the new Republic immediately upon independence?

A. Should the new Republic have most favored nation status?

B. Would the new Republic be eligible for beneficiary status under the Caribbean Basin Initiative?

A: We would not, of course, object to the Congress' expressing its willingness to consider any trade arrangement that had been negotiated between the United States and an independent Puerto Rico. Whether any particular arrangement, including a free trade arrangement along the lines of that with Canada, would be desirable would have to be determined by the President in light of all relevant factors and circumstances, including the compatibility of such arrangement with U.S. GATT obligations.

Most-favored-nation tarriff treatment is among the basic GATT principles, and the clear bias in favor of such treatment is reflected in relevant provisions of the Trade Act of 1974. U.S. law does provide, however, for departures from the most-favored-nation standard in certain circumstances. These include more favorable tarriff treatment for products from countries eligible for participation in the General System of Preferences (GSP) program, and the Caribbean Basin Initiative. Participation in is limited by the terms of the Caribbean Basin Economic Recovery Act which, in section 212(b) identifies by name the 27 countries eligible for such participation. Puerto Rico is, of course, not among those named in section 212(b). The Act also sets forth a number of other eligibility criteria. Puerto Rico would as a matter of law be eligible for designation as a CBI beneficiary if the law were changed to include it among the list of eligible countries, and Puerto Rico otherwisde satisfied the requirements of the Statute for such designation.

Q: THE DEPARTMENT HAS INDICATED ITS OBJECTIONS TO CERTAIN TRADE PROVISIONS UNDER INDEPENDENCE, YET HAS NOT MENTIONED ANY CONCERN OVER WHETHER CONTINUATION OF SECTION 936 MIGHT TRIGGER TAX-SPARING AGREEMENTS WITH OTHER NATIONS. DOES THE DEPARTMENT HAVE SUCH A CONCERN?

A: A number of tax treaties in force between the United States and other countries provide for the extension of tax-sparing to our treaty partner in the event that tax-sparing is extended by the United States to a third country. The continuation of section 936 benefits to a newly-independent Puerto Rico could give rise to claims on the part of our treaty partners to the same treatment. While there may be a difference between the continuation for a transitional period of a pre-existing benefit, and extension of a wholly new benefit, whether our treaty partners would see the matter in that way cannot be predicted. To that extent, therefore, the issue is of concern.

Q: IS THE ADMINISTRATION'S OBJECTION TO SUBPART 5 BASED ON PUERTO RICO CONDUCTING INTERNATIONAL AVIATION DISCUSSIONS, OR ON THE POSSIBLE IMPACT OF SUCH DISCUSSIONS ON DOMESTIC CABOTAGE?

TO WHAT EXTENT WOULD SUCH AUTHORITY, IF GRANTED PUERTO RICO, LIMIT U.S. ABILITY TO NEGOTIATE AIR RIGHTS AGREEMENTS WITH RESPECT TO OTHER U.S. PORTS?

A: The rights of U.S. airlines to provide air services to and from foreign destinations are set forth in more than seventy bilateral civil aviation agreements in force between the United States and other countries. In negotiating such agreements, the parties primarily seek to ensure that their national airlines will have fair access to international air markets. To achieve this, they grant access to destinations in their respective domestic markets in exchange for access to destinations in foreign markets. The United States, as do most other countries, prohibits the carriage by a foreign airline of passengers and goods between two domestic points ("cabotage").

By granting Puerto Rico broad powers to enter into its own bilateral aviation agreements while continuing to treat it as an internal point for domestic purposes, Subpart 5 would impinge on U.S. rights under aviation agreements between it and foreign countries, and would adversely affect U.S. air carriers. The cabotage aspects of the bill would not appear to promise benefits that would outweigh the adverse impact on U.S. carrier operations in the affected markets.

Q: YOU OBJECT TO PUERTO RICO HAVING INDEPENDENT TARIFF AUTHORITY AUTHORITY BECAUSE IT WOULD REQUIRE PUERTO RICAN PARTICIPATION IN U.S. TRADE NEGOTIATIONS AND OBLIGATE THE PRESIDENT TO CONSULT WITH THE GOVERNOR ON ANY PROPOSED RATE CHANGES. IN FACT, ISN'T THE BASIC PROBLEM THAT PUERTO RICO IS WITHIN THE CUSTOMS TERRITORY OF THE UNITED STATES, AND IS CONSEQUENTLY BOUND BY WHATEVER INTERNATIONAL AGREEMENTS THE U.S. ENTERS INTO?

WHY DOES THE ADMINISTRATION OBJECT TO CONSULTING WITH PUERTO RICO ON MATTERS AFFECTING TRADE WHICH WOULD HAVE AN IMPACT ON PUERTO RICO?

A: We do not object to consultation with Puerto Rico on matters of particular relevance to Puerto Rico. We do object, however, to mandatory consultations and Puerto Rican representation on U.S. delegations, both of which we believe are incompatible with the President's responsibility for the conduct of U.S. foreign relations. These concerns would, of course, be heightened were Puerto Rico to be given such a privileged position in respect of trade issues generally, and not just those of particular relevance to it.

The proposed grant of limited independent tariff authority to Puerto Rico raises once again the serious constitutional problems associated with any impediment to the ability of the United States to speak with one voice in its international relations. Moreover, granting to Puerto Rico an independent tariff authority would deprive the United States of the advantages of representing a single customs territory in the GATT and other international fora concerned with tariff and trade matters.

Q: It appears that the Department supports maritime jurisdiction with Amendments under the commonwealth option but not under statehood. Is that correct?

A: The Department does not support the maritime jurisdiction provisions of S.712 under either the statehood or commonwealth options. The Department believes there is less reason to object on international law and policy grounds under the commonwealth option.

Q: If that is correct, and Puerto Rico were subsequently to request statehood, would the Department insist that it relinquish maritime jurisdiction as the price of statehood? Does the Department take the same approach with respect to Puerto Rico's current three-league jurisdiction on submerged lands? And if not, why?

A: The Department cannot predict the position it would take on the hypothetical question posed. The Department supports the grant to Puerto Rico of three league jurisdiction and has no objection to Puerto Rico continuing to exercise such jurisdiction under either the commonwealth or statehood options.

Q: Would the Department, by close of business Friday, provide the Committee with specific language to implement all of the recommendations made by the State Department this afternoon? And specifically, would it provide language on marine jurisdiction which would work under both the statehood and commonwealth options?

A: The Department has provided suggested language to implement the Department's testimony on July 11 to the Office of the Management and the Budget.

Q: You indicate on page 9 of your testimony that Subpart 16(a), which would authorize the Secretary to delegate to the Governor of Puerto Rico passport issuing authority, is unnecessary since the Secretary has such power under 22 U.S.C. 211a. This morning, the Department of Justice testified that such authority was in its view unconstitutional under Buckley v. Valleo. A few years ago, the Department took the same approach to prevent the Governor of Guam from issuing passports. Why have you changed your position? And have you informed the Department of Justice?

A: In 1986, the Secretary of State withdrew from the Governors of Guam, Puerto Rico, and the Virgin Islands the authority to issue passports which had been delegated to them pursuant to 22 U.S.C. 211a. The Secretary's action was based upon practical, managerial, and security considerations, not on constitutional grounds. Thus, the withdrawal of the Governors' authority was based on the following considerations: the desire to achieve the widest possible issuance of the machine readable passport, efficient implementation of the automated passport issuance system, the need to phase-out antiquated equipment then used in Puerto Rico, and the need to promote the secure and uniform issuance of U.S. passports. For these reasons, the Secretary concluded that all domestically issued passport should henceforth only be issued from Regional Passport Agencies.

The State Department has taken no position on the constitutionality of delegating passport issuing authority to the Governor of Puerto Rico or any other territorial Governor, but will be consulting with the Justice Department on this question in the near future.

Q: Is there any reason, other than budgetary constraints, why the Department does not have a passport agency in San Juan?

A: The Department's opposition to the establishment of a passport agency in San Juan under the authority of the Secretary of State is based on budgetary and efficiency considerations.

The establishment of a San Juan passport agency under the authority of the Governor of Puerto Rico would engender additional concerns, many of which motivated the withdrawal of the Governor's passport issuing authority in 1986 as described in the answer to the above question. In the interests of promoting security and the uniform application of U.S. nationality and passport laws, it is essential that the Secretary enjoy full control over passport issuance. This is especially important in light of 22 U.S.C. 2705, the enactment of which in 1982 established the passport as legal proof of U.S. citizenship. Establishment of a passport agency under the authority of the Governor of Puerto Rico, however, would derogate from the full control which the Secretary now has over passport issuance.

Q: The Committee was informed during our hearings in San Juan that the major problem with visa issuance is that visas for Puerto Rico are issued in Vermont and that the time delays exacerbate the ability of persons in Latin America and the Caribbean from visiting Puerto Rico. Is there something which the Administration can do to alleviate the situation?

A: Visas are not issued in Vermont, but rather are issued by consular officers at foreign service posts throughout the world. Certain types of visas require prior approval of petitions by INS, and the Department understands that the INS has a Regional Service Center in Vermont which adjudicates immigrant and nonimmigrant visa petitions for a geographical region that includes Puerto Rico. Any questions regarding that facility should be directed to INS.

POLITICAL STATUS OF PUERTO RICO

THURSDAY, JULY 13, 1989

U.S. Senate,
Committee on Energy and Natural Resources,
Washington, DC.

The committee met, pursuant to notice, at 10:10 a.m., in room SD-106, Dirksen Senate Office Building, Hon. J. Bennett Johnston, chairman, presiding.

OPENING STATEMENT OF HON. J. BENNETT JOHNSTON, U.S. SENATOR FROM LOUISIANA

The Chairman. On February 9th of this year the President of the United States in his State of the Union message endorsed statehood and urged the Congress to move in that direction. On March the 25th, at the request of all three parties, I indicated an intention to move forward with status legislation, and I wrote the President on March the 25th, stating that we were going to move in that direction, and requesting his wholehearted cooperation.

On April the 12th of this year I wrote the Secretary of the Treasury, detailing that the concerns of Treasury in financial matters were central to the status determination. On May the 10th I wrote the President again, giving the hearing date of today, indicating that we were going to inquire into these matters today.

On May the 18th we announced the hearing today. On June the 13th I sent a second letter to the Secretary of the Treasury asking that he be prepared to offer testimony on specific alternative language detailing the issues in some detail that have been identified. There have been innumerable conversations—the latest was Saturday of last week—with Mr. Andrew Card of the President's office, stating what we were going to inquire into.

Today we have that central witness on the question of the Treasury on 936, on other issues which are central to this determination. The statement, which I have just received, states, in effect, that the administration believes that the discussion of Puerto Rico's future status should not be encumbered at this stage by tax and financial provisions in the current bill; that the administration looks forward to working with your committee at the appropriate time in fashioning an integrated economic package. And the ultimate insult is that we are told that the administration witness must get over to the House Ways and Means Committee at 11:00.

Can you imagine the insult to this committee and to this whole Puerto Rican status question? It is totally unacceptable. I just cannot imagine after all that has gone on that we receive that kind of treatment. It is just unbelievable.

With that, we will hear from Kenneth W. Gideon, Assistant Secretary for Tax Policy for the Department of the Treasury.

STATEMENT OF KENNETH W. GIDEON, ASSISTANT SECRETARY, TAX POLICY, DEPARTMENT OF THE TREASURY

Mr. Gideon. Mr. Chairman and members of the committee, I am prepared today to offer the administration's discussion of S. 712, a bill to provide for a referendum on the political status of Puerto Rico. This bill would give the people of Puerto Rico an historic opportunity to vote upon the status of that island. The bill would provide for a referendum to be held in 1991 in which the Puerto Rican people could decide among the options of statehood, independence or commonwealth status.

The administration strongly supports the right of the people of Puerto Rico to decide for themselves on the status of the island. Further, as the President has noted a number of times, he favors the admission of Puerto Rico into the Union as a state, thereby assuring the people of Puerto Rico an equal standing with other United States citizens.

However, by providing for a status referendum, the United States government would also be assisting the Puerto Rican people to exercise the basic political right to determine the nature of their government. The choice facing the people of Puerto Rico is fundamentally a political one with long-term implications for their rights and obligations as citizens. Each voter must determine for himself or herself the type of political relationship that should exist between Puerto Rico and the United States.

By its very nature, a status referendum determines a people's political future. Individual voters must weigh the implications of their vote, not only for themselves but for future generations. The administration firmly believes that the Puerto Rican people should be given an opportunity to express their will in a manner that recognizes the historic and fundamentally political nature of their decision of self-determination.

The importance of the decision they face as a people we believe transcends any narrow concern about the specific aspects of economic or fiscal structures. For this reason, the administration believes that the discussion of Puerto Rico's political future status should not be encumbered at this stage by the tax and financial provisions in the current bill.

The selection among the possible status options should be a choice made by the people of Puerto Rico unaffected by the bias which specific economic cost and benefits could bring to the process. After that choice has been made, appropriate tax and financial relationships between Puerto Rico and the United States could be formed consistent with the choice of the Puerto Rican people.

The administration recognizes the difficulty of isolating the impact of tax and financial issues from the question of Puerto Rico's future status. We believe that appropriate transition mechanisms will ultimately have to be developed to minimize the economic disruption to Puerto Rico resulting from any change from current commonwealth status.

In addition, we believe that a transition to statehood can be structured so that the Puerto Rican government after making appropriate use of its own resources would not be forced to incur a net revenue loss during this transition.

The administration would support a transition grant to Puerto Rico to assist in achieving that result. The budgetary treatment of a transition should be consistent with sound budget discipline.

Finally, we believe that there should be a level economic playing field among all the options. The development of provisions that will properly achieve these goals will require a careful cooperative analysis by the administration, Congress, and the government of Puerto Rico. The resulting package, we think, would probably consist of interrelated provisions affecting Puerto Rico's own tax system, the federal tax system, and direct federal grants.

Accordingly, depending on the specific alternatives chosen, many will be involved in the process including, for example, the tax writing committees of the Congress.

The administration looks forward to working with your committee at the appropriate time in fashioning an integrated economic package that meets the administration's commitments to Puerto Rico and which is fully acceptable to both Congress and the Puerto Rican government to lay a foundation for that process.

The CHAIRMAN. Let me interrupt you at that point. Are you saying that the people of Puerto Rico should choose their status without knowing what the tax status will be, without knowing what we are doing with 936 or social security or federal programs or taxes or any of those things? Just leave aside the economics until after they choose?

Mr. GIDEON. We think any of those choices, Senator Johnston, will be very complex.

The CHAIRMAN. Well, no kidding. No kidding. I mean, what do you think we have been writing you since February the 9th about? Of course it is complex. That is why we called you up here. And you are saying they ought to just make these choices without knowing what the economic effect on Puerto Rico is going to be?

Mr. GIDEON. We think that the bill should state that there will be appropriate transitions, that basically the overall basis will be made as neutral and level as possible. But to go into the specifics of that negotiation in terms of writing specific—in other words, rewriting the whole Puerto Rican income tax, rewriting the entire United States income tax provisions—I mean 936 itself after all is a provision that covers some ten pages. It has not been a stable provision. It has been revised several times over the past few years.

I think under commonwealth status it is likely that it would have continuing changes.

The CHAIRMAN. Now, under your jurisdiction as lead agency there are these federal programs from food stamps to Medicaid. What happens to those? Appropriate transition? I mean, is that the kind of language you want the people of Puerto Rico to make this choice on?

Mr. GIDEON. We think that the administration will be prepared to come down here and work with you and try to put forward general language.

The CHAIRMAN. When is that appropriate time?

Mr. GIDEON. Well, Senator, I think that Mr. Card and the others are quite willing to come up here and meet with you basically as soon as they get back from Europe.

The CHAIRMAN. Well, I mean, we met on Saturday, and we met before that. But your statement says I look forward at the appropriate time in fashioning an integrated economic package. I mean, that is after the vote?

Mr. GIDEON. I think in its full complexity that is probable. I mean, otherwise what you are doing is you are articulating three totally complete systems, in other words, three full revenue packages with all their pieces, the first, two of which definitionally you are not going to use.

We would hope that at this stage we could make appropriate assurances to the Puerto Rican people to say, look, we are going to give you a bill that will provide appropriate, even-handed transitions in any one of these three statuses.

The CHAIRMAN. Now, even-handed—that means if commonwealth is—that is relatively a status quo economically—does that mean that the other statuses cannot cost more than commonwealth?

Mr. GIDEON. In terms of cost?

The CHAIRMAN. Yes, dollars, cost.

Mr. GIDEON. I think that we are prepared to look at basically all options that you are interested in. We have given you revenue data.

The CHAIRMAN. Well, what is the answer to that question?

Mr. GIDEON. We would like to see in terms of making this playing field level, that all of those options would be relatively the same.

The CHAIRMAN. Well, where is this transition grant going to come from. I mean, what do you mean? You say you want to give appropriate assurances to the people of Puerto Rico. I am a voter in Puerto Rico. I want to know what is going to happen to my island. I want to know about my job. I want to know about my taxes. I want to know about my grants, and you say do not worry. It is going to be a level playing field.

You say two things which seem to me to be totally at odds with one another. One, you support transition grants so that the economy will not be devastated under statehood. Number two, you say it is a level playing field, so I assume that means that you do not give statehood something that commonwealth does not have or vice versa or, that if you do, that you tell us what those things are that you do. Has this been thought through at all over there?

Mr. GIDEON. I think that you can develop mixes on all of those that would make the playing field level, and that would be our objective.

The CHAIRMAN. Well, that is what we want to do. That is what we are about right now. We want to develop those mixes. We understand who has jurisdiction over taxes, but it is a total package, and we want to be able to recommend.

As part of that package I talked to Senator Bentsen just yesterday, and he is totally in cooperation with what we are doing. We want to have recommended legislation reported out of this committee, but not reported to the floor, on taxes, on social security, on matters that are not in our jurisdiction because we planned to try to give the people of Puerto Rico self-determination, and they expect self-determination. In my judgment, they deserve self-determination and the only way they are going to get it is to have real choices where they are not just told we will do what is appropriate for you.

You know, what is really colonial is to tell the people of Puerto Rico, do not worry. Big brother up here is going to do what is fair, what is nice, what is even-handed, what is appropriate. Just mush words.

We want to do something specific, and we want to do it in cooperation with Puerto Rico. We want them to be involved in this process, and they are. But, we cannot just give them mush words. I mean, they want to know what is going to happen, and that is a daunting task. It is a big task.

Mr. Gideon, you are receiving all of this criticism and maybe you do not deserve it personally, so maybe—if we are going to make this thing work, there has got to be a whole new attitude over there at the administration. The President of the United States, I have talked to the President. He is on board with this idea of self-determination. He tells me he is, and I believe him. He prefers statehood, but in order to have statehood, you have got to have three viable realistic choices.

Yes, it ought to be a level playing field. We have said our operating rule is one of budget neutrality, not because the President said that, or not because Treasury says it, but because we know the realities of the budget up here. You cannot say well, we will give you several billion dollars here or there under any new status because there is not that money to go around. We have got to do it within a level playing field, and a level playing field really means no new raids on the treasury.

But, we have got to design a package. That package has got to include all these things from food stamps to taxes to 936. That is why we want to make a recommendation that includes everything so that then they will know specifically.

It is a big task, but you see, if we lose this Congress, then next Congress you get into gubernatorial elections in Puerto Rico, and you cannot do it, and so that means you lose four years, and who knows what happens after four years. I mean, our time to move is now.

As we told the last administration witnesses, I mean, we may have to stay up at night sometime and work on this. My staff has. It is that kind of commitment.

The people in Puerto Rico are looking at this thing as if it is really important, believe me. To say that a meeting that has been scheduled all this time and the chief administration witness has got to leave at 11:00 because he is being commanded by the House to come over, I mean, you just do not understand what is going on with that kind of attitude. You just have no conception.

There are three and a half million people in Puerto Rico who are sitting on the edge of their seats. I suspect a lot of them watching right now, wondering what are they doing up there? He has got to leave the hearing to go to another hearing? This thing has been scheduled for months.

Well, please proceed.

Mr. **Gideon**. As I was saying, we believe that each of the political options covered by the bill, statehood, independence and commonwealth status, raises special issues that affect the tax systems of both Puerto Rico and the United States.

Now, I have given several comments that are much more detailed in my statement. In order to provide an opportunity for questions, I am going to only cover some of the highlights of those at that point, and then I will answer your questions afterward.

Regardless of the status option ultimately chosen, we believe that a primary goal of the U.S. government should be to get clearly defined tax provisions that are in response to that choice. We want to give certainty in tax policy and, as I have noted, we are willing to work with you to achieve that end.

Let me just note some of the specific kinds of issues that arise under the statehood option, for example. There are some points worth noting about the repeal of the Puerto Rican income tax that would occur under section 16(a) of the bill. First, section 16(a) repeals only the income tax laws of the Commonwealth of Puerto Rico, and accordingly, the bill would apparently leave in place Puerto Rican tax laws, for example, on estates and gifts, excises, property taxes, and the like.

Second, the repeal of the income tax laws would reduce annual Puerto Rican tax collections by about $2 billion based on the governor's proposed fiscal '89 budget. Finally, as a technical matter, the bill seems to tie the effective date of the repeal of the tax laws to the date of Puerto Rico's admission as a state rather than to the beginning or end of the taxable year.

The bill does not indicate whether administrative provisions in the Puerto Rican income tax law would remain in effect to allow Puerto Rican authorities to complete processing of preadmission taxable years.

If federal taxes were to become applicable on January 1, the January 1 following admission, tax administration would be facilitated. The Puerto Rican income tax could be continued thereafter for the limited purpose of allowing Puerto Rican authorities to continue to process and collect liabilities under the prior law.

Moreover, any such provisions should explicitly acknowledge the power of the Puerto Rican commonwealth legislature to provide an interim state income tax should it choose to do so, pending enactment of a permanent income tax system by the state legislature after statehood.

In terms of the extension of the federal income tax, Puerto Rico, as indicated in my written statement, there are a myriad of highly complex questions here. Accordingly, careful consideration should be given to ensuring that there would be a flexible mechanism for resolving those issues.

Similarly, the proposed cover-over of federal tax to Puerto Rico raises a number of issues concerning how such a cover-over would be measured and implemented, and they are all discussed in more detail in my written statement.

Section 16(b) of the bill proposes to retain section 936 for an unspecified period after statehood. While most section 936 companies currently benefit from Puerto Rican income tax exemptions under the industrial incentives legislation and thereby pay very little income tax, the effect of continuing 936 while simultaneously repealing Puerto Rico's income tax law could mean that all 936 companies enjoy a total elimination of an income tax liability as a result of statehood.

Again, as we have mentioned, we should be careful to preserve Puerto Rico's taxing capability with respect to those companies. Section 936 applies not only to Puerto Rican business profits of U.S. corporations, but also to their Puerto Rican source investment income from qualified investment from those sources. That is known as the qualified possession source investment income.

It can include, for example, lending of section 936 funds through a Puerto Rican financial institution to qualifying borrowers that are beneficiary countries of the Caribbean Basin Initiative.

This bill does not indicate whether the transitional period during which 936 would remain in effect would be the same for both operating profits and income from investment of the so-called QPSII investments. We think that issue should be resolved and an appropriate transition provided.

The federal excise tax cover-over under section 16(c) involves primarily the rum tax cover-over, federal excise tax cover-overs have provided a funding to the Puerto Rican government, and there is an issue, again, of equity to the state government.

However, the Senate Finance Committee in 1984 expressed the view that the cover-over practice should not be expanded without a thorough examination. Accordingly, while we would want to provide appropriate offsets, I think that whether this specific practice could be continued is a question.

Under the independence option, section 5.4 of the independence option also contains several specific provisions relating to taxation. First and foremost is the continuation of section 936.

Section 5.4 provides that the section 936 credit currently allowed under the code shall remain in full force and effect for 15 years after independence with respect to corporations which now or at any time during that period meet the requirements of section 936.

There are several points to note about this provision. First, this language indicates that it is the present intention of Congress that section 936 benefits as currently provided in the code would continue to apply without change to companies doing business in Puerto Rico.

Pursuant to this language this would seem to be the case regardless of whether the basic 936 credit as it applied in the remaining U.S. possessions might be changed by Congress after Puerto Rico's independence.

This feature is problematic in light of the numerous amendments that have been made to 936 in recent years. Second, the bill would not only preserve 936 benefits for those companies which are currently receiving them, but would also provide them to U.S. companies that might set up operations in Puerto Rico at any time during the transition period.

Moreover, the proposed continuation of section 936 is not tied to any continuation of the industrial incentives tax legislation of Puerto Rico. In other words, the bill as drafted would require the United States to continue to exempt Puerto Rican income of section 936 companies even if Puerto Rico substantially increased its level of taxation on those companies.

Third, the proposed continuation of section 936 raises a significant question about the bill's impact on the understandings reached with a number of U.S. treaty partners including China, Korea, Barbados, Cypress, Jamaica, Malta, and Morocco to the effect that those treaties would be renegotiated or amended to include tax-sparing provisions if the United States ever gave tax sparing to any other foreign country.

We have not attempted to quantify the revenue cost of implementing those changes in the event this provision triggers them. However, it should be noted that it has been a cornerstone of United States tax treaty policy supported by both Congress and the executive branch that tax-sparing credits such as those provided under section 936 would not be included in U.S. tax treaties with other countries.

Finally, the bill is unclear with respect to the scope of U.S. tax benefits that are intended to be preserved along with section 936. For example, section 5.4(a) does not mention 100 percent dividends received deduction applicable to certain dividends from 936 companies under section 243 of the Internal Revenue Code. However, the language of section 5.4(b) of the independence option implies that the dividends received deduction is intended to be preserved.

Again, since this is an area where Congress has continuing interest, the ability of Congress to be consistent in that area would be a concern. Section 5.4(b) of the bill speaking about the phaseout of 936, according to this provision Puerto would have to agree to give up the 936 credit in order for it to disappear before the expiration of the 25-year period after independence.

In the absence of an agreement by the joint commission under this point of view, the only change that could be made during the period from year 15 through 25 is that earnings repatriations presumably dividends by 936 companies could be taxed on a phased-in basis.

It is not clear how the drafters intended this proposal to interact with the provisions of the U.S. corporate alternative minimum tax which already includes some portion of the 936 dividends in its base.

Moving on to section 5.4(d) and the allocation of taxing rights, specifically the source and situs rules, section 5.4(d) provides that both the United States and Puerto Rico shall have taxing jurisdiction over income sourced within its territory and earned by individuals resident in the other jurisdiction over property situated within its territory including transfers of such property by gift or by death and over products consumed in its territory.

We think this provision is designed to allocate taxing jurisdiction for purposes of income, estate, gift, and excise. It is unclear, however, whether the provision is intended to allocate exclusive taxing jurisdiction as opposed to merely primary taxing jurisdiction on the source of the income.

For example, it is unclear whether the provision is suggesting that only Puerto Rico can tax the income earned in Puerto Rico by U.S. resident individuals. We note that section 5.4(f) provides that sourcing determinations shall be made in terms of a tax treaty to be entered into promptly upon Puerto Rico's independence and meanwhile by the laws of each country.

Section 5.4(e) which raises the foreign tax credit and tax-sparing issues, 5.4(e) contains two provisions. First, it guarantees taxpayers resident in either the United States or Puerto Rico that they may take a foreign tax credit for taxes payable to the other country in accordance with various provisions of section 5.4. In the case of Puerto Rican taxes, the bill appears to guarantee a credit without regard to the normal code rules relating to the creditability of foreign taxes.

Section 5.4(e) also gives Puerto Rico most favored nation status in the event that the United States grants tax-sparing credits to any other country, it does this by saying such credits shall be available ipso facto to Puerto Rico in the event the United States amends its laws on the provision of tax-sparing credits or reaches an agreement on such provisions of a tax-sparing credit with any other nation.

By contrast, most of our understandings with other countries in the developing world and our treaty partners refer to tax sparing by saying that it would be granted only by an amendment in their treaty in the event most favored nation understanding is triggered by some other treaty. In other words, there would be an appropriate negotiation in each such case, rather than an automatic application.

Finally, the treaty relationship discussed in section 5.4 provides that various source, situs and other definitional determinations required under section 5.4 shall be made in accordance with the terms of the tax treaty to be entered into promptly.

As indicated above, the provision indicates that such determinations would be made in the meantime under the current domestic law of the two jurisdictions. Here again, it is unclear whether the relevant domestic laws could be unilaterally amended without violating some international law agreement that might be deemed to arise from this type of provision.

Section 5.6(b), continuation of exemption for interest on Puerto Rican government obligations, section 5.6 of the independence option contains a provision that would require the United States to continue to provide an exemption for 25 years after independence for interest payments made on debt obligations issued by the government of Puerto Rico whether issued before or after independence.

This provision would be unique. The United States does not provide such exemptions to U.S. taxpayers holding foreign government obligations even in the context of income tax treaties. Moreover, the exemption would apparently have to be equivalent to that "currently provided by law" on Puerto Rican bonds raising the question whether any subsequent amendments to United States law regarding domestic tax-exempt bond provisions would apply to Puerto Rican bonds if this provision were enacted.

Let me move on now to the commonwealth status. Section 4 of the commonwealth option provides for an amendment to section 9 of the Puerto Rico Federal Relations Act. One part of that amendment would render federal statutes inapplicable to Puerto Rico unless they are consistent with the policy established under subpart 3 of that option; that is, to enable the people of Puerto Rico, among other things, to accelerate their economic and social development and unless they have proper regard for the economic, cultural, ecological, geographic, demographic and other local conditions of the Commonwealth of Puerto Rico, it is not clear to us how that part of the amendment would affect United States tax statutes currently applicable to Puerto Rico.

Indeed, it would seem for Congress to clarify that these provisions would not be applicable to tax customs and similar revenue measures.

In addition, we believe that Congress should make clear that tax benefits such as section 936 cannot be regarded as benefits that will last indefinitely under commonwealth status, but rather that these are incentives which Congress will continue to review and revise as necessary.

A further part of the amendment to section 9 would provide that the Commonwealth of Puerto Rico may continue to enter into in its own right international, cultural, commercial, educational and sports agreements and other agreements of like nature.

In addition, the same amendment would authorize the governor of Puerto Rico to take any official action to promote the international interest of Puerto Rico that requires the consent of the United States—that does not require the consent of the United States and is not expressly prohibited by law.

This amendment appears to contemplate that U.S. consent would be implicit unless the President objected on the grounds of foreign relations or national defense after being notified of the proposed action by the governor of Puerto Rico.

Currently Puerto Rico does not have the authority to negotiate or enter into international double taxation or similar agreements in its own right, and it is unclear how the proposed amendment would affect that issue.

It is certain, however, that a grant of independent tax treaty authority to Puerto Rico would significantly complicate the negotiations of the United States treaties and quite possibly undermine several existing conventions.

Mr. Chairman, I appreciate the opportunity to be here, and I am happy to answer the questions of the committee.

[The prepared statement of Mr. Gideon follows:]

EMBARGOED FOR RELEASE UNTIL DELIVERY
EXPECTED AT 10:00 A.M. EST

TESTIMONY OF KENNETH W. GIDEON
ASSISTANT SECRETARY (TAX POLICY)
DEPARTMENT OF THE TREASURY
BEFORE THE
COMMITTEE ON ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE
WASHINGTON, D.C.
JULY 13, 1989

Mr. Chairman and Members of the Committee:

It is a pleasure to be here today on behalf of the Administration, to discuss S. 712, a bill "To Provide for a Referendum on the Political Status of Puerto Rico." This bill would give the people of Puerto Rico an historic opportunity to vote upon the status of that island. The bill would provide for a referendum, to be held in 1991, in which the Puerto Rican people could decide among the options of statehood, independence, or commonwealth status.

The Administration strongly supports the right of the people of Puerto Rico to decide for themselves on the status of the island. Further, as the President has noted a number of times, he favors the admission of Puerto Rico to the Union as a state, thereby assuring the people of Puerto Rico an equal standing with other United States citizens. However, by providing for a status referendum, the United States Government would be assisting the Puerto Rican people to exercise the basic political right to determine the nature of their government.

The choice facing the people of Puerto Rico is fundamentally a political one, with long-term implications for their rights and obligations as citizens. Each voter must determine for himself or herself the type of political relationship that should exist between Puerto Rico and the United States. By its very nature, a status referendum determines a people's political future. Individual voters must weigh the implications of their vote not only for themselves but also for future generations.

The Administration firmly believes that the Puerto Rican people should be given an opportunity to express their will in a manner that recognizes the historic and fundamentally political nature of their decision of self-determination. The importance of the decision they face as a people transcends any narrow concern about specific aspects of economic or fiscal structures.

For this reason, the Administration believes that the discussion of Puerto Rico's future status should not be encumbered at this stage by the tax and financial provisions in the current bill. The selection among the possible status options should be a choice made by the people of Puerto Rico unaffected by the bias which specific economic costs and benefits could bring to the process. After that choice has been made, appropriate tax and financial relationships between Puerto Rico and the United States could be formed consistent with the choice of the Puerto Rican people.

The Administration recognizes the difficulty of isolating the impact of tax and financial issues from the question of Puerto Rico's future status. Appropriate transition mechanisms will ultimately have to be developed to minimize economic disruption to Puerto Rico resulting from any change from the current commonwealth status. In addition, we believe that a transition to statehood can be structured so that the Puerto Rican government, after making appropriate use of its own resources, would not be forced to incur a net revenue loss during this transition. The Administration would support a "transition grant" to Puerto Rico to assist in achieving that result. The budgetary treatment of a transition to statehood should be consistent with sound budget discipline. Finally, we believe that there should be a level economic playing field among options.

The development of provisions which will properly achieve these goals will require a careful cooperative analysis by the Administration, Congress, and the government of Puerto Rico. The resulting package would probably consist of interrelated provisions affecting Puerto Rico's own tax system, the Federal tax system, and direct Federal grants. Accordingly, depending on the specific alternatives chosen, many will be involved in the process, including, for example, the tax-writing committees of the Congress.

The Administration looks forward to working with your committee at the appropriate time in fashioning an integrated economic package which meets the Administration's commitments to Puerto Rico and which is fully acceptable to both Congress and the Puerto Rican government. To lay a foundation for that process, I would like to review with you today some of the technical issues which are presented by the provisions in the current bill. While not intended as either an endorsement or rejection of these provisions, my comments will hopefully highlight particular problems which the current language raises.

Each of the political options covered by the bill -- statehood, independence, and commonwealth status -- raises special issues that affect the tax systems of both Puerto Rico and the United States. The following comments are limited to those issues. They are not intended to reflect any views on the desirability of any of the status options.

Regardless of the status option under consideration, we believe that a primary goal of the bill in question should be to ensure that the tax implications of the option are clearly defined. Certainty in the application of the tax law is always a goal of tax policy, and we believe that it is especially important to strive for that certainty in these circumstances, where the Puerto Rican people are facing the possibility of fundamental changes to their government's structure. The focus of my testimony, therefore, will be to identify the tax results of this bill's provisions as drafted, to note those ambiguities which the bill raises, and to highlight those issues which the bill's tax provisions do not currently address.

I. GENERAL REVENUE EFFECTS OF S. 712

It is difficult to present very precise estimates of the Federal revenue consequences of the various options described in the bill, but it may be helpful for purposes of this discussion to consider some rough guidelines.

Both the independence and the statehood options assume some form of reduction of the tax incentives currently provided under Internal Revenue Code ("Code") section 936. It should be noted that even under the commonwealth option, Congress can continue to review and revise section 936 and other tax benefits as necessary.

We estimate that in FY 1989 the tax benefits received by section 936 corporations amount to about $1.9 billion. If section 936 benefits are phased out, some section 936 corporations may choose to leave Puerto Rico. However, the nature of most section 936 company operations makes it unlikely that they could find a good substitute for Puerto Rico in some low-tax foreign location. Thus, if companies do leave the island, it is most likely that they would move back to the mainland where they would be subject to U.S. tax.

A phase-out of section 936 benefits would cause economic dislocation on Puerto Rico, at least in the short run. Employment in 936 companies now accounts for about 12 percent of total Puerto Rican employment. However, it is very difficult to project the extent to which Federal tax collections would be affected by this dislocation. Under the statehood option, collections of personal income tax may be somewhat reduced for a time; but as discussed below, fully phased-in Federal personal income tax collections from Puerto Rico can be expected to be relatively modest.

The statehood option presents the issue of how a newly-imposed Federal income tax will interact with a Puerto Rican state tax system. The effects of this change must be considered for both individual and business tax revenues.

The extension of Federal income tax to individuals in Puerto Rico would perhaps raise some $500 million per year. In comparison, the Puerto Rican government collected about $900 million in personal income taxes in their fiscal year ending June 30, 1989, or about 30 percent of total Puerto Rican revenue from local sources. This amounted to only about 5 percent of personal income in Puerto Rico.

As a state, Puerto Rico could design an income tax which would maintain combined revenue levels. Under either the commonwealth or independence options, Puerto Rico could continue a system similar to the current Puerto Rican tax.

With respect to business taxation, the Puerto Rican government now collects about $1.0 billion a year in taxes from business, which represents about 10 percent of business income. Since about 40 percent of this revenue is collected from exempt section 936 corporations, Puerto Rico may experience some loss of revenue if a phase-out of section 936 benefits causes any of these companies to reduce their Puerto Rican operations.

Under statehood, Federal corporate tax would also apply to Puerto Rican business that does not now benefit from section 936. This includes locally incorporated, or foreign, companies as well as section 936 corporations that do not receive a full or partial exemption from Puerto Rican tax. This would increase Federal revenues by about $300 million per year at 1989 levels.

Puerto Rico does not now pay Federal excise taxes. Assuming that by virtue of its becoming a state, U.S. excise taxes became applicable within Puerto Rico, this change would result in an increase in revenues of approximately $150 million. In addition, the Federal Government would gain approximately $100 million per year in customs duties which are now collected and segregated for the benefit of Puerto Rico.

Finally, Puerto Rico may choose to make adjustments on the expenditure side instead of, or in addition to, adjustments on the revenue side. Government employment now accounts for 23 percent of total employment in Puerto Rico. In addition, Puerto Rican government enterprises play a very important role in the Puerto Rican economy. A reduction of these expenditures, either to reduce taxes or to provide incentives to business may, therefore, be one of the consequences of any phase-out of current provisions.

Under the independence option, a phase-out of section 936 benefits would increase Federal tax collections if 936 corporations remained in Puerto Rico as U.S. corporations or if they moved back to the United States. However, some Puerto Rico-oriented companies in routine industries, such as apparel or food processing, may choose to reincorporate as Puerto Rican companies. The Federal revenue gain may therefore not be quite as large as under statehood. Under the independence option, Federal excise taxes would only apply, as they do now, on imports from Puerto Rico; and the Federal Government would not collect any customs duties on goods imported into Puerto Rico. However, this would be offset somewhat by increased customs collections on imports from Puerto Rico. In addition, there might be a modest revenue pickup from withholding taxes on dividends paid to Puerto Rican residents, etc.

* * * *

With the above rough estimates in mind, I would now like to turn to a technical review of bill as drafted. Before discussing the bill's specific provisions, however, it may be useful to briefly summarize the tax relationship that currently exists between Puerto Rico and the United States.

II. SUMMARY OF EXISTING TAX LAWS

Generally speaking, the Commonwealth of Puerto Rico is not considered part of the "United States", as that term is used in the Internal Revenue Code ("Code") (see section 7701(a)(9) and (d)). Thus, Puerto Rico has its own tax laws, and the U.S. internal revenue laws do not extend fully to Puerto Rico. Depending upon the nature of the tax involved, different methods have been used to allocate taxing jurisdiction between the two governments.

A. Income taxes

United States income tax. The United States generally taxes the worldwide income of U.S. citizens, resident alien individuals, and domestic corporations. It also taxes the U.S. income of foreign corporations and nonresident alien individuals. Two important provisions affect the U.S. taxation of U.S. persons with Puerto Rican income.

First, under section 933 of the Code, the United States exempts the Puerto Rican source income of individuals who are bona fide residents of Puerto Rico. Consistent with section 933, U.S. citizens resident in Puerto Rico may be exempted from the withholding of Federal tax on their Puerto Rican source earnings (see section 3401(a)(8)).

Second, section 936 provides an effective exemption for certain Puerto Rican income of qualifying U.S. corporations that elect its benefits and that are engaged in business in Puerto Rico. The exemption is granted in the form of a "tax sparing" credit, under which the company's U.S. tax liability on its qualifying Puerto Rican income is reduced by a credit for a hypothetical Puerto Rican tax equal to the amount of U.S. tax due on that income. Because Puerto Rican tax law provides generous exemptions to certain business operations there, section 936 corporations enjoy a very low aggregate effective tax rate.

Puerto Rican income tax. Puerto Rico is authorized by Congress to enact its own income tax system. In 1954, the Puerto Rican legislature adopted its present income tax system, which is based on the U.S. Internal Revenue Code of 1939. In the absence of a tax exemption grant, Puerto Rico taxes all Puerto Rican source income earned by U.S. and foreign persons (including corporations) and taxes the worldwide income of all Puerto Rican resident individuals and Puerto Rican corporations.

The Puerto Rican individual income tax rates are somewhat higher than corresponding U.S. rates, and the Puerto Rican personal exemptions are somewhat lower than the U.S. exemptions. This will remain true even after tax law changes enacted by the Puerto Rican legislature in 1987 are fully phased in.

Under a series of industrial incentives laws, Puerto Rico has granted generous exemptions to certain business and investment income of qualifying businesses. Thus, while Puerto Rico's nominal corporate tax rate is slightly higher than the U.S. corporate tax rate, the exemption grants significantly reduce the effective Puerto Rican corporate tax rate.

B. Estate and gift taxes

United States estate and gift taxes. The United States taxes the worldwide estates of U.S. citizens and noncitizen decedents domiciled in the United States, as well as the U.S. situs estates of nondomiciliary aliens. The United States allows a foreign tax credit for Puerto Rican estate taxes imposed on the Puerto Rican situs estate of U.S. decedents (see section 2014(g)). Similarly, the U.S. gift tax applies to all gifts by U.S. citizens and noncitizen domiciliaries, and to gifts of U.S. situs property by nondomiciliary aliens. For purposes of the U.S. estate and gift taxes, U.S. citizens resident in Puerto Rico who are citizens solely because of being citizens of Puerto Rico or because of their birth or residence in Puerto Rico are treated as nondomiciliary aliens, taxable only on transfers of U.S. situs property (see sections 2208, 2209, 2501(b), and 2501(K)).

Puerto Rican estate and gift taxes. Puerto Rico generally taxes the worldwide estate of Puerto Rican resident decedents and the Puerto Rican situs estate of nonresident decedents. The amount of Puerto Rican estate tax on the Puerto Rican situs estate of a U.S. citizen resident in Puerto Rico can depend upon whether the United States includes that property in the U.S. gross estate. Puerto Rico allows a credit for U.S. estate taxes paid on the U.S. situs property of a Puerto Rican resident decedent. Similarly, Puerto Rico taxes all gifts by Puerto Rican resident donors and gifts of Puerto Rican situs property by nonresident donors.

C. Employment taxes

The various Federal employment taxes, including the self-employment tax (section 1401), the social security or FICA taxes (sections 3101 and 3111), and the unemployment insurance or FUTA tax (section 3301), are fully applicable within Puerto Rico as in the United States. (See sections 1402(b), 3121(e), and 3306(j)).

D. Excise/sales taxes

U.S. excise taxes. The United States does not impose a broad-based Federal sales tax. The Code does, however, impose a wide variety of excise taxes, including retail taxes, manufacturer taxes, services taxes, environmental taxes, alcohol taxes, etc. Generally, these taxes do not apply within Puerto Rico because of an exemption in the Puerto Rico Federal Relations Act (48 U.S.C. sec. 734).

Code sections 7652 and 7653 provide special rules with respect to taxes on articles manufactured in Puerto Rico and shipped into the United States, and vice versa. Basically, these rules treat such shipments as if they were imports from or exports to a foreign country. Under section 7652, articles of Puerto Rican manufacture shipped into the United States are subjected to a Federal tax equal to the amount of the Federal tax that would apply to similar articles manufactured in or imported into the United States. For example, by virtue of section 7652, the United States imposes a tax at the rate of $12.50 per proof gallon on distilled spirits produced in Puerto Rico and shipped into the United States, because that is the tax imposed on U.S.-produced distilled spirits.

The special feature about these rules, however, is that they call for a rebate or "cover-over" of these equalization taxes to Puerto Rico. Section 7652(a) generally requires the United States to cover over to the Puerto Rican Treasury the amount of these Federal equalization taxes imposed on Puerto Rican articles shipped into the United States. In addition, section 7652(e) generally requires the United States to cover over to Puerto Rico (and, under a sharing arrangement, to the Virgin Islands) the Federal tax collected on all rum imported into the United States. By virtue of section 7652(f), however, the amount of these alcohol taxes to be covered over to Puerto Rico cannot exceed $10.50 per gallon.

Section 7653(b) provides that articles otherwise subject to Federal taxes will be exempt from the normal taxes if they are shipped into Puerto Rico. Instead, section 7653(a) imposes a tax on such items equal to the amount of Puerto Rican tax applicable to similar items manufactured in Puerto Rico.

Puerto Rican excise taxes. Pursuant to excise tax amendments enacted in 1987, Puerto Rico imposes a 5 percent excise tax on a broad range of commodities, transactions, and occupations.

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I would now like to turn to a review of the issues presented by the tax provisions under each of the three political options described in the bill.

III. COMMENTS ON STATEHOOD OPTION

A. In General

Status of pre-existing laws. Title II of S. 712, relating to the statehood option, contains three sections which are particularly relevant to the application of both the U.S. and Puerto Rican tax laws. These sections are:

- Section 9 (Laws in Effect), which provides that Puerto Rico's territorial laws remain in force after statehood until amended or repealed by Puerto Rico, and that all Federal laws will have the same force and effect within Puerto Rico as elsewhere in the United States.
- Section 14 (Repeal and Amendment of Inconsistent Laws), which provides that all Puerto Rican or Federal laws or parts thereof which are in conflict with S. 712 are repealed or amended to conform with S. 712.
- Section 16 (Economic Adjustment from Territory to State), which provides a number of special rules relating to the adjustment of Puerto Rico's tax status.

We are not at all sure how these three provisions are intended to interact in the tax area. The ambiguity affects the status of pre-existing laws of both Puerto Rico and the United States.

For example, section 16(a) provides that Puerto Rico's income tax laws shall stand repealed upon admission of the state. Section 16 is silent about the remainder of Puerto Rico's tax laws. This could mean that all of Puerto Rico's tax laws, other than the income tax laws explicitly mentioned in section 16, remain in effect as state taxes until amended, by virtue of section 9. In other words, section 14 might be read narrowly to repeal or amend only those Puerto Rican tax laws which are manifestly inconsistent with S. 712 by virtue of being explicitly repealed or amended by some other specific provision of S. 712. Alternatively, one might read section 14 broadly to repeal or amend those Puerto Rican tax provisions, in addition to the income tax provisions explicitly mentioned in section 16, which are inconsistent with the general structure of a state tax system (*e.g.*, the provision granting a credit against Puerto Rican estate tax liability for Federal estate taxes imposed on the U.S. situs property of a Puerto Rican resident decedent).

Similarly, section 9 provides that Federal laws shall have the same force and effect within Puerto Rico as elsewhere in the United States. Section 16(a) generally reaffirms this approach with respect to Federal income tax laws by providing that "Federal Income Taxes" shall immediately apply to Puerto Rico. However, section 16(b) requires Congress to make provision so that "economic and fiscal exceptions of the Internal Revenue Code, already granted, such as those allowed under Section 936 of said code" shall remain in full effect for an unspecified number of years. Section 16(b) does not provide further guidance on the scope of the Federal tax exceptions that are to continue to apply to Puerto Rico. It is therefore impossible to tell which exceptions other than Code section 936 are intended to continue to apply to Puerto Rico.

Thus, S. 712 as currently drafted does not provide clear guidance as to the types of provisions of pre-existing Puerto Rican or U.S. tax law that are intended either to continue or to be repealed upon admission of the state. The draft bill indicates that detailed additional provisions are expected to be added to section 16 of Title II of the bill. Such additional provisions could undoubtedly help to provide greater certainty to both taxpayers and the revenue authorities on the tax implications of the statehood option.

Each of the special tax arrangements which would apply to Puerto Rico under the statehood option of S. 712 could be subject to challenge under the uniformity clause of the Constitution (Art. I, sec. 8, cl. 1), which broadly requires taxes to be uniform throughout the United States. We recognize that the tax committees would have to address the specific issues that could be presented with respect to each particular tax arrangement. Nevertheless, these issues must be fully addressed with respect to such tax provisions before a definitive position on their inclusion and effect can be developed.

Bearing in mind the fact that certain key provisions in the bill's tax provisions remain incomplete at this time, I would like to discuss certain implications of those provisions.

B. Specific Provisions of Section 16

1. Section 16(a)

Basic approach. Paragraph (a) of section 16 describes the basic structure of the income tax changes that would take place upon Puerto Rico's admission as a state. First, it provides that Puerto Rico's income tax laws would stand repealed immediately.

Second, subject to certain exceptions to be discussed later, it provides that Federal income tax laws would apply immediately to Puerto Rico. Third, it provides that there would be some cover-over of Federal income tax revenues to Puerto Rico for an unspecified transitional period.

Repeal of Puerto Rican income tax laws. There are a few points worth noting about the repeal of Puerto Rico's income tax laws. First, as already noted, section 16(a) repeals only the income tax laws of the Commonwealth of Puerto Rico. Accordingly, the bill would apparently leave in place other Puerto Rican tax laws (*e.g.*, estate and gift taxes, excise taxes, property taxes, etc.). Second, the repeal of the income tax laws would reduce annual Puerto Rican tax collections by about $2 billion (based upon the Governor's proposed fiscal 1989 budget). Finally, as a technical matter, the bill seems to tie the effective date of the repeal of the income tax laws to the date of admission of Puerto Rico as a state, rather than to the beginning or end of a taxable year. The bill does not indicate whether administrative provisions of the Puerto Rican income tax law would remain in effect to allow the Puerto Rican tax authorities to complete processing of pre-admission taxable years. If Federal income taxes were to become applicable on the January 1 following admission, tax administration would be facilitated. The Puerto Rican income tax law could be continued thereafter for the limited purpose of allowing Puerto Rican authorities to continue to process and collect liabilities under prior law. Moreover, any such provision would explicitly acknowledge the power of the Puerto Rican Commonwealth Legislature to provide an interim state income tax should it choose to do so, pending enactment of a permanent income tax system by the state legislature after statehood.

Extension of Federal income taxes to Puerto Rico. There are also several points worth noting about the immediate extension of Federal income taxes to Puerto Rico. Again, as already noted, the bill does not clearly indicate whether other Federal taxes are meant to be extended fully to Puerto Rico.

With respect to U.S. citizens resident in Puerto Rico, the extension of the income tax laws presumably means that they will become subject to Federal taxes, rather than Puerto Rican taxes, on their Puerto Rican source income. This will be the result as long as the exclusion of Puerto Rican source income formerly provided by Code section 933 is not preserved under section 16(b) of the bill. The bill would also seem to require that these individuals become subject to the withholding of Federal income taxes on their Puerto Rican earnings.

With respect to non-U.S. citizens resident in Puerto Rico, their U.S. income tax status would depend upon their classification as either resident aliens or nonresident aliens, taking into account the inclusion of Puerto Rico as part of the United States for purposes of applying the resident alien definition of Code section 7701(b).

The substitution of the Federal income tax regime for the Puerto Rican income tax regime also raises a number of issues for Puerto Rican corporations. Because of the inclusion of Puerto Rico as part of the United States after admission, these corporations, which are now treated as foreign corporations for U.S. income tax purposes, would be treated as domestic corporations. This would generally mean that Puerto Rican corporations would become subject to full U.S. income tax on their worldwide income.

If the section 936 credit become available to these corporations under the statehood option -- because they would become U.S. corporations -- they might thereby preserve their exemption from U.S. tax on their Puerto Rican income. The availability of the section 936 exemption, combined with the repeal of the Puerto Rican income tax, could result in a decrease in the income tax liability of Puerto Rican corporations that pay partial or full Puerto Rican income tax now (because they do not qualify for full exemption under the Puerto Rican incentives tax legislation). The section 936 benefit is potentially available to a broader, or at least a different, class of companies than the Puerto Rican incentives tax exemptions. In addition, Puerto Rican locally incorporated companies that had been fully exempt under the Puerto Rican tax system might become subject to tax (for example, if they failed to qualify for exemption under section 936).

The recharacterization of Puerto Rican corporations as domestic corporations could have a number of corollary effects on those corporations, their affiliates, shareholders, and lenders, none of which are explicitly addressed by the draft bill. For example, the change might or might not be treated as an inbound reorganization triggering the provisions of Code section 367, which could result in a taxable event. The change would raise the question of whether various corporate tax attributes from the Puerto Rican system would carry over for Federal income tax purposes (e.g., net operating losses, earnings and profits, method of accounting, etc.). The change could result in a Puerto Rican corporation becoming eligible for the first time to join in the consolidated return of its U.S. affiliated group, with corresponding questions about its ability to use accumulated losses against the income of such a group.

The Puerto Rican corporation could become eligible for the first time to be treated as a small business ("S") corporation as defined in Code section 1361, with the effect of eliminating its corporate tax liability altogether. (This effect would be independent of section 936 and would provide an alternative exemption for qualifying corporations if section 936 also remained in effect.) If the Puerto Rican corporation had been a controlled foreign corporation under Subpart F of the Code, it would presumably shed that status, although the impact of such a change on matters such as its section 959 "previously taxed income" account would have to be addressed. Interest and dividends paid by the Puerto Rican corporation would become U.S. source income, potentially ineligible for the section 936 exemption in the hands of recipient section 936 companies, but eligible for the 70% or 100% deduction of dividends received under Code section 243.

As indicated by the issues just discussed, the extension of the Federal income tax law to the state of Puerto Rico would raise a myriad of highly complex tax questions. Accordingly, careful consideration should be given to ensuring that there would be a flexible mechanism for resolving such issues.

Cover-over of Federal income taxes to Puerto Rico. Section 16(a) also provides for the cover-over to the Puerto Rican Treasury of certain Federal income taxes. The bill's language raises a number of issues.

First, the bill does not clearly indicate how to measure the amount of Federal income taxes that would be covered over to Puerto Rico. A number of different measurement approaches and combinations thereof are conceivable. For example, the cover-over could be equal to the amount of Federal income taxes collected on Puerto Rican source income of all U.S. taxpayers. This would require all U.S. taxpayers to report separately the amount of their Puerto Rican source income and their other income, and to allocate an appropriate amount of deductions to their Puerto Rican source income in order to determine the amount of their Federal tax liability attributable to that income.

Alternatively, or in combination with that approach, the cover-over could include the amount of Federal income taxes collected on the worldwide income of Puerto Rican residents. For purposes of this alternative, Puerto Rican residents could be deemed to mean individuals resident in Puerto Rico and Puerto Rican corporations. This alternative would require individuals to report their status as residents of Puerto Rico under whatever residency standard would be established for that purpose. The calculation of the separate Federal tax liability of a Puerto Rican corporation could be difficult where, for example, that corporation is part of a U.S. consolidated group.

If the cover-over measure is intended to be linked to the amount of income tax Puerto Rico would have collected if its income tax law had remained in effect, the cover-over measures just described could be limited by imposing as a cap the amount of Puerto Rican tax that would have been collected from the taxpayer on the affected income if Puerto Rico's tax laws were still in effect. Such an approach would require the additional computation and reporting of the hypothetical Puerto Rican tax liability under the principles of pre-statehood Puerto Rican law, or some rough estimate based on actual Puerto Rican collections in the last pre-statehood years.

The bill calls for a phase-down of the cover-over during an unspecified number of years ("the proceeds of said taxes shall be transferred to the Treasury of Puerto Rico in an amount to be diminished by ____% of the monies collected each year for a ____year period"). Apparently, this language is intended to result in a straight-line reduction of the cover-over during the transitional period. The bill does not mention any other adjustment to the cover-over amount. For example, the cover-over amount apparently would not be adjusted to reflect in any way the amount of state income tax revenues that Puerto Rico might collect during the transition period by enacting state income tax laws. In addition, the bill does not mention any adjustment that might be made to the cover-over amount to reflect rebates or other subsidies that Puerto Rico might grant to taxpayers whose Federal income tax payments are being covered over to Puerto Rico. The bill does not provide the rule enacted in 1984 (in Code section 7652(c) and (d)) to limit certain Federal excise tax cover-overs in cases where the Federal tax revenues attributable to Puerto Rico are liable to be artificially inflated or otherwise manipulated.

2. Section 16(b)

Section 16(b) calls upon Congress to make provision so that "economic and fiscal exceptions of the Internal Revenue Code, already granted, such as those allowed under Section 936" shall be continued in full for an unspecified period after statehood, to be phased out gradually thereafter. This provision raises a number of questions. For example, it does not indicate which "exceptions", other than section 936, are intended to be retained during the transitional period. Thus, the provision does not specify whether it is intended to cover section 243(b)(1)(C) (relating to the 100 percent dividends received deduction for certain dividends from section 936 companies) or section 933 (relating to the exemption from Federal tax for the Puerto Rican source income of bona fide residents of Puerto Rico).

In addition, the bill does not clearly indicate when or how Congress would make provision to continue section 936 or other exceptions, nor does it indicate how long such exceptions would continue. Moreover, the bill provides no guidance on whether section 936, if it were to continue for Puerto Rico, would be frozen in its current form, or whether Puerto Rico's version of section 936 would be subject either to whatever amendments Congress might subsequently make to section 936 as it applies to other possessions, or to subsequent amendments specifically applicable to Puerto Rico.

The bill appears to envision that section 936 would remain in effect not only for corporations which had elected its benefits prior to statehood, but also those which might elect its benefits after Puerto Rico becomes a state.

While most section 936 companies currently benefit from Puerto Rican income tax exemptions under the industrial incentives legislation, thereby paying very little income tax, the effect of continuing section 936 while simultaneously repealing Puerto Rico's income tax laws could mean that all section 936 companies would enjoy a total elimination of their income tax liability as a result of statehood.

The section 936 exemption applies not only to Puerto Rican business profits of U.S. corporations, but also to their Puerto Rican source investment income derived from qualifying investments of those profits. The latter category of investment income, known as QPSII ("qualified possession source investment income"), can include income from lending section 936 funds through a Puerto Rican financial institution to qualifying borrowers in beneficiary countries of the Caribbean Basin Initiative (CBI). The bill does not indicate whether the transitional period during which section 936 would remain in effect would be the same for both operating profits and the income from investing those profits in QPSII investments.

3. Section 16(c)

Section 16(c) calls for Congress to enact an omnibus act to, among other things, "assure appropriate continuity in the treatment...of alcohol excise taxes". It is not clear whether this provision contemplates a permanent continuation of the cover-over of U.S. alcohol excise taxes that occurs under Code section 7652 or a gradual phase-out similar to those mentioned in sections 16(a) and 16(b).

The Federal excise tax cover-over method of providing funding to the Puerto Rican Government has given rise to concerns about equity relative to state governments. For example, the Senate Finance Committee in 1984 expressed the view that the practice should not be expanded without a thorough examination of that issue. S. Rep. 98-169, I-1000. Additional concerns have arisen from the provision by Puerto Rico of subsidies to producers of articles subject to the Federal excise tax.

IV. COMMENTS ON INDEPENDENCE OPTION

A. In General

Title III of S. 712 deals with the independence option, and section 5.4 of Title III specifically addresses a number of tax issues. More generally, however, section 4.1(a) deals with the status of pre-existing law upon proclamation of independence. Section 5.3 commits the United States not to impose trade barriers or quotas on merchandise coming into the United States from Puerto Rico until proclamation of independence and for twenty years thereafter.

Status of pre-existing laws. Under section 4.1(a)(2), all U.S. laws applicable to Puerto Rico immediately prior to independence shall no longer apply in the Republic of Puerto Rico. For purposes of U.S. tax laws, this provision presumably means that those Federal tax laws that treat Puerto Rico either as part of the United States or as a possession of the United States shall no longer apply, and that Puerto Rico shall instead be treated exclusively as a foreign country for U.S. tax purposes. Thus, for example, U.S. citizens living and working in Puerto Rico could become eligible for the foreign earned income exclusion under Code section 911. Generally, except for the section 911 exclusion, income derived by U.S. citizens and residents from foreign sources is subject to U.S. tax with a credit for foreign income taxes. However, this system would be substantially modified with respect to Puerto Rico by the bill's proposal to continue section 936.

Under section 4.1(a)(3),

> all laws and regulations of the Commonwealth of Puerto Rico in force immediately before the proclamation of independence shall continue in force and shall be read with such modifications, adaptions, qualifications, and exceptions as may be necessary to bring them into conformity with the Constitution of the Republic of Puerto Rico, until such time as they shall be replaced with new legislation . . . .

In other words, Puerto Rico's tax laws would generally remain in effect as national tax laws in an independent Puerto Rico, until changed by new legislation.

Both of these general conclusions are subject to the special provisions of section 5.4, to which we now turn.

B. Section 5.4(a)

Continuation of section 936. Section 5.4(a) provides that the section 936 credit currently allowed under the Code shall remain in full force for 15 years after independence with respect to corporations which now or at any time during that period meet the requirements of section 936. There are several points to note about this provision.

First, this language indicates that it is the present intention of Congress that section 936 benefits, as currently provided in the Code, would continue to apply without change to companies doing business in Puerto Rico. Pursuant to this language, this would seem to be the case regardless of whether the basic 936 credit, as it applies to the remaining U.S.

possessions, might be changed by Congress after Puerto Rico's independence. This feature of the bill is problematic in light of the numerous amendments that have been made to section 936 in recent years.

Second, the bill would not only preserve 936 benefits for those companies which are currently receiving them, but would also provide them to U.S. companies which might set up operations in Puerto Rico at any time during the transition period. Moreover, the proposed continuation of section 936 is not tied to any continuation of the industrial incentives tax legislation of Puerto Rico. In other words, the bill as drafted would require the United States to continue to exempt the Puerto Rican income of section 936 companies even if Puerto Rico substantially increased its level of taxation on those companies.

Third, the proposed continuation of section 936 raises a significant question about the bill's impact on understandings reached with a number of U.S. income tax treaty partners (including China, Korea, Barbados, Cyprus, Jamaica, Malta, and Morocco) to the effect that those treaties would be renegotiated or amended to include tax sparing provisions if the United States ever gave tax sparing to any other foreign country. We have not attempted to quantify the revenue cost of implementing those changes in the event this provision triggers such changes. However, it should be noted that it has been a cornerstone of U.S. tax treaty policy, supported by both Congress and the Executive Branch, that tax sparing credits (such as those provided under section 936) will not be included in U.S. tax treaties with other countries.

Finally, the bill is unclear with respect to the scope of the U.S. tax benefits that are intended to be preserved along with section 936. For example, section 5.4(a) does not mention the 100 percent dividends received deduction applicable to certain dividends from 936 companies under section 243. However, the language of section 5.4(b), to which we now turn, implies that the dividends received deduction is intended to be preserved.

C. Section 5.4(b)

Phase-out of section 936. Section 5.4(b) contains a number of provisions relating to the phase-out of the section 936 benefit after the initial 15-year period.

First, the section provides that in the tenth year after independence, an joint Puerto Rican-U.S. commission shall be established to recommend changes to the section 936 benefit to take place at the end of the 15-year period. If this group cannot agree on changing the credit, the bill provides that the basic exemption shall remain in full force through the 25th year after independence. In other words, Puerto Rico would have to agree to give up the section 936 credit in order for it to disappear before the expiration of 25 years after independence.

In the absence of an agreement by the joint commission, the only change that would be made during the period that is 15-25 years after independence would be to begin to subject "earnings repatriations" (presumably referring to dividends) by section 936 companies to U.S. tax on a phased-in basis. This proposal seems to assume that the section 243 one hundred percent dividends received deduction had remained in effect after independence. Even the U.S. taxation on the dividends is subjected to the requirement that the United States grant a credit for Puerto Rican taxes on the dividends. It is not clear how the drafters intended this proposal to interact with the provisions of the U.S. corporate alternative minimum tax, which include some portion of section 936 dividends in the alternative minimum taxable income base.

D. Section 5.4(c)

Business profits/permanent establishment. Section 5.4(c) contains a provision, commonly found in much more expanded form in income tax treaties, which would exempt enterprises resident in either Puerto Rico or the United States from taxation by the other country on their business profits, unless those profits are attributable to a permanent establishment in that other country. This provision differs, however, from comparable provisions in U.S. income tax treaties. For example, it does not define either "business profits" or "permanent establishment", both of which are commonly defined in tax treaties. It is not accompanied by the kind of "anti-treaty-shopping" provision that would prevent third country residents from abusing the relationship between Puerto Rico and the United States by setting up a Puerto Rican company to enjoy the U.S. tax benefit. It is not accompanied by other provisions (e.g., nondiscrimination, exchange of information, competent authority procedures, etc.) which typically form part of the overall bargain in a treaty relationship. Moreover, like the other treaty-type provisions in section 5.4, this provision does not clearly indicate whether its drafters intended it to create an obligation under international law, which neither jurisdiction could change unilaterally.

We have asked the State Department for its views on this question, and defer to its conclusions. We would also defer to the State Department on the issue of whether these provisions, including the part of section 5.4(f) which calls for a tax treaty to be negotiated between Puerto Rico and the United States, infringes in any way on the constitutional allocation of treaty-making power to the President with the advice and consent of the Senate.

E. Section 5.4(d)

Source/situs taxing jurisdiction. Section 5.4(d) provides that both the United States and Puerto Rico shall have taxing jurisdiction over income sourced within its territory and earned by individuals resident in the other jurisdiction, over property situated within its territory (including transfers of such property by gift or at death), and over products consumed in its territory. This provision seems designed to allocate taxing jurisdiction between the United States and Puerto Rico for purposes of income, estate, gift, and excise taxes. It is unclear whether the provision is intended to allocate exclusive (as opposed to merely primary) taxing jurisdiction to the source or situs country. For example, it is unclear whether the provision is suggesting that only Puerto Rico can tax the income earned in Puerto Rico by U.S. resident individuals. We note that section 5.4(f) provides that sourcing determinations shall be made according to the terms of a tax treaty to be entered into promptly upon Puerto Rico's independence, and meanwhile by the laws of each country.

F. Section 5.4(e)

Foreign tax credit and tax sparing. Section 5.4(e) contains two provisions. First, it guarantees taxpayers resident in either the United States or Puerto Rico that they may take a foreign tax credit for taxes payable to the other country in accordance with the various provisions of section 5.4 In the case of Puerto Rican taxes, the bill appears to guarantee a credit without regard to the normal Code rules relating to the creditability of foreign taxes.

Section 5.4(e) also gives Puerto Rico most favored nation status in the event that the United States grants tax sparing credits to any other country. It does this by saying that such credits shall be available "*ipso facto*" to Puerto Rico in the event that the United States amends its laws on the provision of tax sparing credits or reaches an agreement on the provisions of a tax sparing credit with any other nation. By contrast, most understandings between the United States and its developing country treaty partners referring to tax sparing would say that tax sparing will be granted to them only by amendment of their treaty in the event their most favored nation understanding on tax sparing is triggered.

G. Section 5.4(f)

Treaty relationship. Section 5.4(f) provides that the various source, situs, and other definitional determinations required under section 5.4 shall be made according to the terms of a tax treaty to be entered into promptly between the United States and Puerto Rico. As indicated above, the provision indicates that such determinations would be made, in the meantime, under the "current" domestic laws of the two jurisdictions. Here again, it is unclear whether the relevant domestic laws could be unilaterally amended without violating some international law agreement that might be deemed to arise from this type of provision.

H. Section 5.6(b)

Continuation of exemption for interest on Puerto Rican government obligations. Section 5.6 of the independence option contains a provision which would require the United States to continue to provide an exemption for 25 years after independence for interest payments made on debt obligations issued by the government of Puerto Rico, whether issued before or after independence. This provision would be unique; the United States does not provide such exemptions to U.S. taxpayers holding foreign government obligations even in the context of income tax treaties. Moreover, the exemption would apparently have to be equivalent to that "currently provided by law" on Puerto Rican bonds, raising the question whether any subsequent amendments to the domestic tax exempt bond provisions would apply to Puerto Rican bonds if this provision were enacted.

I. Section 5.3

Duty-free trade. While I defer to my USTR colleague to comment on the trade aspects of this bill, I do want to underscore an area of particular Treasury concern. Section 5.3 provides that the United States will not impose trade barriers or quotas on articles coming into the United States from Puerto Rico until proclamation of independence and for twenty years thereafter.

This provision does not distinguish between (1) products of Puerto Rico, that is, products that are either wholly obtained or substantially processed in Puerto Rico, and (2) third-country goods shipped through Puerto Rico. The consequences are far-reaching, going beyond our bilateral trade relationship with Puerto Rico, since third-country textiles and other goods could circumvent U.S. quotas and tariffs.

A more effective and typical formulation is to specify that duty-free treatment be accorded to "products of" Puerto Rico. This narrows eligibility, excluding third-country goods in which Puerto Rico does not have a significant economic stake.

V. COMMENTS ON THE COMMONWEALTH OPTION

Subpart 4 of the commonwealth option provides for an amendment to section 9 of the Puerto Rico Federal Relations Act. One part of that amendment would render Federal statutes inapplicable in Puerto Rico unless they are consistent with the policy established under subpart 3 of that option (i.e., to enable the people of Puerto Rico, among other things, to accelerate their economic and social development), and unless they have proper regard for the economic, cultural, ecological, geographic, demographic, and other local conditions of the Commonwealth of Puerto Rico. It is not clear to us how that part of the amendment would affect U.S. tax statutes currently applicable in Puerto Rico, if at all. Indeed, it would seem appropriate for the Congress to clarify that these provisions would not be applicable to tax, customs, or similar revenue measures.

In addition, we believe Congress should make clear that tax benefits such as section 936 cannot be regarded as benefits that will last indefinitely under commonwealth status, but rather as incentives which Congress will continue to review and revise as necessary.

A further part of the amendment to section 9 would provide that the Commonwealth of Puerto Rico may "continue" to enter in its own right into international cultural, commercial, educational, and sports agreements, and other agreements of like nature. In addition, the same amendment would authorize the Governor of Puerto Rico to take "any official action" to promote the international interests of Puerto Rico that requires the consent of the United States Government and is not expressly prohibited by law. The amendment appears to contemplate that U.S. consent would be implicit unless the President objected to the action on foreign relations or national defense grounds, after being notified of the proposed action by the Governor. Currently, Puerto Rico does not have the authority to negotiate or enter into international double taxation or similar agreements in its own right, and it is unclear how the proposed amendment would affect that issue. It is certain, however, that the grant of independent tax treaty authority to Puerto Rico would significantly complicate the negotiations of United States treaties and quite possibly undermine several existing conventions.

The CHAIRMAN. Mr. Gideon, there is a requirement or there is a uniformity provision in the Constitution with reference to taxes. Would that prevent 936 or other similar provisions from being applicable after statehood?

Mr. GIDEON. Well, we have been in consultation with the same constitutional lawyers that you have been talking to, Senator. We believe that certainly an appropriate transition could be provided. We think that it would probably be appropriate where 936 continued for Congress to make appropriate findings about economic conditions in Puerto Rico, perhaps adopt something like an enterprise zone concept. But the short answer in terms of, yes, we think something could be worked out, particularly on a transitional basis.

The CHAIRMAN. How about on a nontransitional basis, say, on the cover-over of rum taxes? Would there be any problem in continuing that indefinitely?

Mr. GIDEON. I think that we would like to see that be transitional as well.

The CHAIRMAN. I mean, is there a problem under the uniformity clause?

Mr. GIDEON. Under the uniformity clause? I am not a constitutional lawyer, Senator. We have asked for the advice of the Department of Justice on those issues.

The CHAIRMAN. Now, there is in, I think, both independence and statehood a provision whereby section 936 is phased out over a period of years. Now, you have stated with respect to section 936 that you are not sure what-all they mean, but it does not cover dividend provision, as I recall, et cetera. But if you cross those I's—I mean dotted those I's and crossed those T's, is there any mechanical problem in phasing out 936 over a period of years, let us say X years, X percent a year to be phased out?

Mr. GIDEON. We think that that absolutely could be done under all three status options as a matter of technical work. I mean, you have alluded to the uniformity clause and other kinds of concerns. Obviously you and the Congress and others have to address those because they are important. But, in terms of our work, we can do it.

The CHAIRMAN. Can you give us a prescribe language preferences, your preference or alternatives? You do not need to specify the number of years because that is a value judgment that this committee will make, the Finance Committee will make, the Senate floor will make, all the committees of jurisdiction in the House will make. But, we need the mechanics and we need these various provisions that you talk about, the dividends, et cetera, which we do not answer.

We would like to have your advice on how to treat that, and we know under the tax code you treat something one way and it triggers something else somewhere else. Can you give us that?

Mr. GIDEON. Well, I think that we certainly can give you general language on this respect in terms, and I think the administration will be down here to help you with those specific things. How far you want to go in detail, I think, is an issue, and I think——

The CHAIRMAN. We want to write the bill. We want to write it right into this. You see, it is not good enough in our judgment to—well, I mean if we cannot do it, we cannot do it. It may be that

Treasury says well, we are too busy with the House side, and we just cannot give you the help, or maybe you cannot do it in a two-year period. I do not know.

I would hate to think that you cannot write legislation in a two-year period. How else can you write legislation.

Mr. GIDEON. I do not think there is any difficulty in terms of with an appropriate period of time in covering all of these matters. I do think that, Senator, it is going to be a daunting task to have a complete package in place, and I guess our question is, for a status referendum to go forward, do we really have to resolve down to the level of all these questions what we need or can we have a broad general frame that will allow the Puerto Rican people to make a choice knowing that they know enough of the broad shape of the tables so that they know what the options are going to be.

The CHAIRMAN. You see, Mr. Gideon, Senator McClure and I introduced three different bills, S. 710, which provides for a referendum by one-word choice, statehood, independence, et cetera. S. 711 provides for this general description, and S. 712 you fill in all of the blanks.

Now, frankly, when we started we thought that S. 711 with the general description leading then to a period of negotiation was probably what we would end up with because it would be too big a job. But all three parties very strongly, every one of them, said, we ought to know exactly because they have had—you see, they have had their referenda there before in Puerto Rico, and nobody—the people really did not accept that as being a definitive statement because they said we do not know what these mean. When you say statehood, what does that mean? What are you going to do with the crown jewels of the economy; i.e., the 936? Is that gone forever? Do we get our full federal programs?

I mean these are the central questions. And that is why the statehood party, the independence party, the commonwealth party, all of them want to know precisely. We may not be able to do it for one reason or another, but just to say after we have been trying to do it here for months that we cannot do it because it is too complicated. I mean, I am not saying you made that decision, but somebody in the administration. I mean, if they burn the midnight oil like our people have been doing, I think we can do it.

The basic choices to be made, I mean, if you tell us mechanically it can be made, this phaseout, then the value judgments are what does it cost and you say, for example, that it cost—what is it—$1.9 billion in 936. In your view, if you phase that out over X percent a year, would you make savings of that X percent a year of $1.9 billion?

Mr. GIDEON. You would certainly have savings, Senator. The real question, of course, is what all the pieces look like because what you spend in one place, I mean, there may be economic reactions. You may need to provide some compensating sources. I mean, all of that we think would have to be addressed, and we are prepared.

The CHAIRMAN. Well, that is right. If we know what all these things cost, I mean, the size of a transition grant for statehood I think would depend on what you are saving on 936, for one thing.

Mr. GIDEON. It would certainly depend upon the source of available revenues.

The **Chairman**. It would depend upon what it is costing to phase in federal programs. Now, we recognize the interdependence of a lot of these programs. I mean, unemployment may go up to the extent you repeal 936, but on the other hand, phasing in federal programs would offset that. So, we need—we need the mechanics of all of these things and then once we get these revenue streams and cost projections of all of these, then we can mull those and say well, this is a level playing field and this is not.

But we cannot even begin to do that until we get the advice as to the specifics on how to design it, how to work the language.

Mr. **Gideon**. Well, Senator, we generally have tried to be helpful to you today. There is a lengthy statement that identifies a number of concerns. They are complicated concerns. They are going to take some work to work out the pieces. I mean, we are not trying to evade you or be unhelpful.

I think that once you go toward the 712 route, though, that you are going to try to articulate all of these things. The task is, I think, significantly larger than it was under the other choice.

The **Chairman**. Well, we understand that. That is why I have been writing these letters month after month. I have been sending studies down there to Treasury. All of the GAO studies, some of which we commissioned, we have been sending down there and saying and here are the questions, listing all of these questions, all of these things you have covered. I mean, they just did not occur to us this morning. They have been long-term smouldering questions.

What we want is advice as to how to solve them.

Senator **Bumpers**. Mr. Chairman, if you would yield, and then I must say I agree with you totally. I do not know how you can expect the people of Puerto Rico to vote. There are a lot of economic considerations in how they vote and if they do not know what they are buying at the time they vote, God knows how it would come out. But I do not see how the administration which is supposed to be so hot for Puerto Rican statehood can expect those people to make a decision unless the Treasury has come up with something that we can give them with some definition and assurance is what the new tax code is going to be and the tax consequences of statehood.

I do not think you need to bother yourself, Mr. Gideon, with independence. That is not going to happen. I do not think there is a person in this room or in Puerto Rico that thinks that.

The **Chairman**. If the Senator would yield, we are very much bothered with independence, and we want independence to be a real viable option, and I am speaking for myself. I have expressed no view on that, and I hope——

Senator **Bumpers**. Mr. Chairman, I am not trying to be the skunk at the lawn party. I am just saying in my personal opinion is that Puerto Rico is not going to vote independence.

The **Chairman**. They may not, but it is essential to give a full and viable choice for independence.

Mr. **Gideon**. And we agree with that.

The **Chairman**. And not just a half-heartedly given independence.

Senator **Bumpers**. I am not suggesting that, but they cannot vote intelligently on any of the three options unless the administration comes with transition rules and some degree of assurances to the people of Puerto Rico on what they are getting under each option.

The CHAIRMAN. Well, that is right.

Senator BUMPERS. That is what we are here for.

The CHAIRMAN. We have got to be sure that we do not criticize independence because if the people of Puerto Rico——

Senator BUMPERS. I am not criticizing independence. I want all the people of Puerto Rico to know I am not criticizing independence. If they want to vote that way, that is fine.

I do not think it would be very smart. [Laughter.]

The CHAIRMAN. Senator McClure.

STATEMENT OF HON. JAMES A. McCLURE, U.S. SENATOR FROM IDAHO

Senator MCCLURE. I want to get involved in this particular discussion, because regardless of what our own opinions might be of the wisdom of one course of action or likelihood of one course of action or another, in order that that be a genuine choice, we have to spell out the details of each of the three options.

Now, you have indicated that it is a daunting task, and there is not any question that that is true. I think each of us realized that, as we started down this path, that it is hard enough to develop all of the detail with respect to one option, let alone spell out details with respect to three. But if we are to really give the people of Puerto Rico a choice, a genuine choice that we are ready to execute, then it seems to me that we have to spell out the details on all three options.

I guess you know and we know that our task is complicated because of the jurisdiction between committees. Somehow we have to bridge that gap. We have been down that road before. We dealt with all of these Compacts of Free Association in Micronesia, and we ran into some difficulty because we did not get it done before we got to the end of the process. And taxing policies proved to be one of the most difficult tasks we had in that instance.

Without plowing old ground or opening old arguments, one of the problems we had is we could not get either Treasury or the tax-writing committees to make the decision with respect to the tax options in a timely way. That is one of the things which I am committed to doing, getting those options in place before we ask the people of Puerto Rico to vote.

Now, recognizing it is a daunting task—and I do not question that at all; I think that is a very good understatement of the degree of the problem—you can do that.

Mr. GIDEON. With time.

Senator MCCLURE. How much time?

Mr. GIDEON. I think that truly is dependent upon the degree of detail that the committee is going to ultimately consider necessary for this process.

Senator MCCLURE. All right. Assuming a fair amount of detail, assuming that you are going to be asked to write—that we expect to write a tax code provision for each of the three options, that if, upon certification of the election results becomes effective, how much time does it take you to write those options?

Mr. Gideon. That would be difficult to say, but it would certainly be a significant period of time, Senator.

Senator McClure. Well, are you talking about hours, or days, or weeks, or months, or years?

Mr. Gideon. I think that in terms of simply our input to it you're probably talking about a period of weeks or months. However, this is not simply us. In other words, one of the difficulties with going this route is we have to know what Puerto Rico's response would be. In other words, under the statehood option you effectively—I mean, you have the question of what will the Puerto Ricans choose to be their own taxing effort.

Under the independence option you have again what will Puerto Rico's taxing options be. In other words, what will Puerto Rico choose to do for itself. Because all of this enters into the fiscal mix.

Senator McClure. Well, certainly in the case of independence all we can do is suggest to them what we would do, and then what they do is their own business, right?

Mr. Gideon. I think that is correct.

Senator McClure. So we should develop the policy here and a statement of policy here for the independence option of what the United States is willing to do, is that not correct?

Mr. Gideon. Yes.

Senator McClure. And then expect, if they vote for independence, that is exactly what they will do, and they will make up their mind about what they will do. Under statehood they do not have the same options that they would have under independence. But we can write what we are willing to do in the event of statehood, is that not correct?

Mr. Gideon. I think that is also correct.

Senator McClure. And a state has certain options with respect to their own internal revenue code for themselves.

Mr. Gideon. That is correct.

Senator McClure. We could write what we are willing to do in the event statehood is the option.

Mr. Gideon. Yes.

Senator McClure. And then what they did as a state with respect to their own state tax policy would be their business.

Mr. Gideon. That is correct.

Senator McClure. Based upon the provisions which we had offered to them, they could then make their own choices.

Mr. Gideon. Yes. But we would have to make assumptions about that effort in terms of kind of achieving this goal of a level playing field among options.

Senator McClure. But we should be able to make up our own mind as to what we believe the United States Federal Government is willing to do in terms of that statehood option.

Mr. Gideon. I think that is correct.

Senator McClure. With respect to the commonwealth status, we already have a body of law. All we are asked to do is make predictions for a period of time as to what we are willing to do under a continued commonwealth status.

Mr. Gideon. Essentially I think that is correct. I think it is important, though, in reviewing this commonwealth legislation to basically say that the benefits, like 936, have been reviewed by Congress before, and Congress would continue to expect to review those benefits, and similarly to resolve issues like the treaty issue.

Senator McClure. If that is indeed the position that we take, then we must be able to state that very clearly so that they know what it is they can expect, what they can count on in the event they choose one or another of the options. If we are unwilling as a Federal Government to define for any period of time in the future what 936 treatment is, then we should say that very clearly, and then they can vote, taking their chances on what we might do.

Is that not correct?

Mr. Gideon. I think that is one of the decisions that the Congress will have to make.

Senator McClure. I agree with that. What we are trying to get from Treasury is what your suggestions are as to how we do those particular things. I know you are pressed for time, and I am sorry for that, but let me ask a couple of slightly more specific questions, if I may, Mr. Chairman.

The Chairman. As far as I am concerned, I mean we are here to question, and the witness has said he has got to go to Ways and Means at 11:00.

Senator McClure. I want to accommodate the needs of the witness, of course. At the same time, we have needs in this committee, too; and I know you are aware of that.

Mr. Gideon. Certainly, Senator. I just noted when I was needed at the other place, but I am happy to stay here if this committee desires it.

Senator McClure. Assume that the results of the referendum occurred in August of 1991, and that statehood wins. And I am not making that as a prediction. Just make an assumption.

Your testimony indicates that the internal revenue laws would commence on January 1, 1992. Is that a sufficient lead time?

Mr. Gideon. It might be. I think what I really mean to say there is that they ought to commence on a January 1st simply for ease of administration. If there were a decision that more time was needed, it seems to me that it would be appropriate to defer that perhaps to the following January 1st, if you needed to.

Senator McClure. All right. Now you say if we needed it. That is my question. If the referendum is in August, would you need more time, then, until the following January 1st to be ready?

Mr. Gideon. I think the real question there is how far—in other words, if everything is fully defined down to the last "i" and "t" crossed, then it probably could go into effect on the January 1st following. On the other hand, if, depending upon the level of detail of the legislation, that will tell us how much implementing time we are going to need.

Senator McClure. Could IRS implement it that quickly?

Mr. Gideon. IRS has some budgetary lead times, and unless basically the committee coordinated closely with the Appropriations Committee, for example, and others in terms of just gear up——

Senator McClure. They would need some money?

Mr. Gideon. They would need some money, and they would need some facilities, and they would need some time to hire people and train them.

Senator McClure. Would it be constitutionally permissible to delay the application until January 1, 1993 under my hypothetical situation? That would be 17 or 18 months.

Mr. Gideon. I would certainly hope so, Senator. Again, I am not the Supreme Court, but——

Senator McClure. Neither are we, but we make judgments.

Mr. Gideon. But I would hope, certainly hope that the courts would honor that as an appropriate transitional period.

Senator McClure. You know the old saying about the Supreme Court. They are not final because they are infallible; they are infallible because they are final.

Mr. Gideon. And we have to live with it as well.

Senator McClure. Both of us do, but we have to make some judgments in advance as to what they are likely to do, and they will not tell us. And that is the reason I ask you is 18 months, is that unconstitutionally too long?

Mr. Gideon. Deferring to my Justice Department brethren who have the final call for the administration on this, we would certainly hope not. And we would be prepared to proceed on that basis.

Senator McClure. Assuming you are correct that appropriate transitional measures are necessary, would it make more sense to delay the proclamation of statehood until 1993, under my hypothetical set of facts, in order to permit Treasury and the commonwealth government to make the necessary adjustments at both the federal and local level?

Mr. Gideon. That is a very difficult judgment call. I think that if you are speaking strictly in terms of my portfolio in the tax area, I would not think that simply in order to provide tax transitions that we would have to do that. It may very well be, though, in terms of organizing a new state government and other things, basically Congress would decide that that was an appropriate way to handle it. Certainly, if you had that kind of lag time between the two, it provides everybody with a greater opportunity to work out the bugs and kinks before we go effective.

Senator McClure. Mr. Chairman, I am going to, for myself at least, adopt the practice here with respect to this particular problem of submitting a list of fairly detailed questions with a request for response in writing.

Mr. Gideon. We would be pleased to respond to those, Senator McClure.

Senator McClure. I do that for two reasons: one, to accommodate your needs, and also to accommodate the Chairman of the committee and the other body. But also because your statement, as I read it, very thoughtfully presents us with a number of questions, and what I want is a number of answers to those questions. And I recognize that what we are asking you to do is exercise some judgment, and this, I realize, requires the administration in its several departments——

Mr. Gideon. In its several capacities, not just mine.

Senator McClure. That is right. To determine what kind of a policy the administration is willing to express with respect to each of the three options.

I want to strongly support what both Senator Bumpers and the Chairman have said. I believe that it is absolutely essential that we spell out in as much detail as is practically possible at this time what we are willing and prepared to do under each of the three options, so that the people of Puerto Rico will know with as much detail as we can give them exactly what to expect from us.

I do not believe that it is fair to them, and I do not believe that it is, on the basis of past history, a good process for us to involve ourselves in, by saying to them make your choice, and after you have made your choice, we will work out the details; trust us. I just do not think that will work, and I do not want to participate in that kind of an activity.

But I will, if that is all right, Mr. Chairman, submit a list of relatively detailed questions with respect to the policy judgments, as well as the technical questions of transition and tax policy.

Mr. GIDEON. And we will see to it that you get appropriate responses from the administration.

Senator McCLURE. Thank you very much.

The CHAIRMAN. By the way, we are going to mark up this bill this month.

Senator Bumpers.

STATEMENT OF HON. DALE BUMPERS, U.S. SENATOR FROM ARKANSAS

Senator BUMPERS. Mr. Chairman, I apologize that I have not been able to participate in as many of these hearings as I would like, but I obviously got here for one of the kernals of the legislation. It is going to be very complicated and difficult, and I am very pleased that I did get here this morning.

I would only say to Mr. Gideon that you might report back to Secretary Brady—as the Chairman said, we are going to mark this bill up—if the administration wants to be an observer, that is fine, but if they want to be a player, they had better get on their horse, because we are going to mark the bill up, and we are going to give the people of Puerto Rico something definitive so that they will know precisely what they are voting on.

I cannot believe the administration incorporates this in their State of the Union address, how hot they are for Puerto Rican statehood, and the Chairman writes to them and says we want your suggestions on each of these three alternatives; we want you to give us something definitive on each of the three alternatives. And then you come here and indicate that you just do not have any thoughts on it.

And so I am just saying that this makes it very complicated for us. The Finance Committee obviously is going to have some input into this. But my point is, unless the answers come back to Senator McClure, I am not going to submit questions, because I think Senator McClure is going to ask all of the relevant questions, and so I am not going to submit any questions for the administration.

But I would hope that you would go back and express some sense of urgency to the Treasury about this and answer his questions in such a way as you would give us some guidance, because if you do not, we are going to guide ourselves.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Bumpers.

Well, Mr. Gideon, I have five pages, single-spaced, of questions here, but I know you have got to get over to the House. I repeat, you know, that is sort of symptomatic of the whole problem, that after all of these months of having talked about this and weeks of having this scheduled, that Treasury does not even give us time to ask questions.

There is nothing we can do about it today, other than to say, I mean, this is very urgent. We are going to mark up this month. We are not the final say. I mean, all we are going to do is recommend on these tax matters to Finance and Ways and Means. And one of the reasons we want to let you go is we do not want to anger the Ways and Means. We are going to need their cooperation.

But we hope somebody is going to wake up to the fact that the people of Puerto Rico are expecting a chance to vote on self-determination. I mean, we have told them over and over again we are going to try to make it happen. The President himself in his State of the Union, he said it first.

Now, it seems to me that is a promise to deliver. Presidents of the United States should not just casually make statements in the State of the Union message and then come back and say oh, I did not mean that; we do not have time; we have got Rostenkowski in the House, and he is so demanding, we do not have time for you, Puerto Rico. It is not good enough; it is just not good enough. I mean, it is this month.

And if Treasury is going to play, they have got to start playing. If I were the Secretary of the Treasury—if I were you, first of all, I would go tell Secretary Brady, who is a man of good will and a friend of mine—we are crazy about him—I would tell him this thing is really very serious. I would tell him to try to give us something for two weeks from now for when we are going to mark up.

I mean, I know it is tough, but I know how committees work around here. We have hearings for months and all of that, and then you get into markup and you get into the legislation. And committees work around the clock, and they, particularly tax-writing committees, they can perform beautiful services, sometimes these omnibus tax bills that are hundreds of pages long.

I know you all can do it, and I know you are the man to do it. You have a reputation as having great skill and ability in this area. And I know you cannot do everything; you cannot be all things to all people, and you cannot minister into the House committee on all of these things at the same time you do this. But I would just urge a sense of urgency, because we are urgently about the business of self-determination here in this committee.

With that, I will let you go to your duties.

Mr. GIDEON. Thank you very much.

The CHAIRMAN. We have a group of witnesses for this afternoon. If any of them are present, we could usefully use this time. Oh, I see. We have a vote on.

Is Mr. Jon Rosenbaum, Jeffrey Shane, James Brennan, Arnold Tompkins, or Alan Raul available to us, does anybody know, for this morning?

[No response.]

The CHAIRMAN. Well, apparently not, so we will reconvene at 2:00 p.m.

[Whereupon, at 11:15 p.m., the committee was recessed, to reconvene at 2 p.m., the same day.]

AFTERNOON SESSION

The CHAIRMAN. The hearing will come to order. I apologize for the Senate schedule. We just had two votes on the floor of the Senate, and so without further ado, let us begin as a panel with Mr. Jon Rosenbaum, Assistant U.S. Trade Representative for Latin America, and the Honorable Arnold R. Tompkins, Acting Assistant Secretary for Planning and Evaluation of HHS.

If we could have those two gentlemen come forward, please, and, Mr. Rosenbaum, if you would begin.

STATEMENT OF JON ROSENBAUM, ASSISTANT U.S. TRADE REPRESENTATIVE FOR LATIN AMERICA

Mr. ROSENBAUM. Thank you, Mr. Chairman. Thank you for inviting me here to day to give the views of the United States Trade Representative on S. 712 legislation providing for a referendum on Puerto Rico's future political status.

USTR shares the view that the legislation should present three viable, fair, and clear alternatives to the Puerto Rican people for their evaluation and decision.

We have examined closely the definitions of the three options contained in the bill to identify implications for U.S. trade policy. Let me start with Title II, the statehood option. The trade policy aspects of this option as currently drafted are limited to section 16(c) of Title II.

The second provides that omnibus legislation should be developed which would, among other actions, assure continuity in the treatment Puerto Rico currently receives as a coffee producer.

Puerto Rico, although part of the United States customs territory for other purposes currently is exempt from the requirements of the international coffee agreement. As a result, Puerto Rico is allowed to import coffee from countries which are not members of the ICA, despite the United States being a party to the agreement, at least through September 30, 1989.

Further, since 1930 Puerto Rico has been allowed to maintain its own tariff regime on coffee under which it charges a duty on all coffee imports, including those from the United States currently at $1.40 per pound. This section of the bill would continue the above practices after statehood.

A preliminary review of GATT precedents and provisions indicates that because Puerto Rico already is a part of the U.S. customs territory and subject to GATT obligations, Puerto Rico's GATT obligations should not change with statehood or under enhanced commonwealth.

With respect to Puerto Rico's ability to import coffee from non-U.S. sources if the United States is a party to the international coffee agreement at the time of Puerto Rico's admission to the union, Puerto Rico would have to abide by the requirements of the agreement just as any other state would.

Specifically Puerto Rico would be able to import coffee only from coffee-producing countries which are members of the ICA. If the agreement has quote requirements as it has had in times past.

This section of the bill also calls for continuation of current treatment for Puerto Rico with respect to alcohol excise taxes. The cover-over of $10.50 a gallon was authorized at the same time that duty-free treatment of rum imports for beneficiaries of the Caribbean Basin was provided under the Caribbean Basic Economic Recovery Act, the so-called CBI.

We believe that any change in current practice regarding this cover-over may lead to pressures to discontinue duty-free treatment for rum under the Caribbean Basin Initiative.

Turning to Title III, the independence option, subparagraph (b) of section 5.3 would prohibit the United States from imposing any trade barriers or quotas of any kind on merchandise and articles coming into the United States from the republic of Puerto Rico during the first 20 years following the proclamation of independence.

This provision, if constitutionally valid and binding on future congresses, would eliminate the ability of the United States for the designated 20-year period to take action under our trade laws against a sovereign country regardless of the acts, policies or practices undertaken by that government.

In addition, the provision fails to specify how exports from the United States to Puerto Rico would be treated after the proclamation of independence.

We believe that section 5.3 as drafted could lead to significant transshipment of goods through Puerto Rico allowing such imports to avoid U.S. tariffs and quotas where applicable altogether. This situation could be particularly problematic in the case of a sector such as textiles and apparel where the application of quotas is widespread and tariff levels are moderately high. Both paragraphs specify treatment for goods merely "coming into" the United States from Puerto Rico.

It is common practice in trade agreements to specify that goods must be "products of" the parties subject to the particular agreement to ensure that benefits of the agreement accrue only to those articles in which the parties have a significant economic stake.

The treatment which this section would provide Puerto Rico is much more favorable than that given to any developing country under either the generalized system of preferences or the Caribbean Basin Initiative.

In addition to the limitations on our action under U.S. trade laws, section 5.3 may violate our international obligations to provide most favored nation treatment to the majority of our trading partners. Among other actions the United States would be required to seek a waiver of our obligations under the GATT, and the likelihood of our succeeding in this endeavor is minimal because of the long duration of the exemption and its limitation to one country.

The action would also trigger U.S. obligations to extend unconditional MFN tariff and trade treatment to certain trading partners under existing friendship, commerce, and navigation treaties and bilateral free trade agreements.

Finally, Mr. Chairman, let me turn to Title IV, the enhanced commonwealth option. Subparagraph (a) of subpart 7 of this title——

The CHAIRMAN. Mr. Rosenbaum, if I may interrupt you at that point, we have a lot of questions for you. In order to allow those questions, we have read your statement, which is very good, and if we may proceed at this time to hear from Mr. Tompkins.

Mr. ROSENBAUM. Very good, sir.

[The prepared statement of Mr. Rosenbaum and a subsequent submittal follow:]

STATEMENT BY
ASSISTANT U.S. TRADE REPRESENTATIVE JON ROSENBAUM
BEFORE THE
SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES
ON S. 712

This statement is being submitted by the Office of the United States Trade Representative in connection with the Committee's consideration of S. 712, legislation to provide a referendum on the future political status of Puerto Rico.

We have examined closely the definitions of the three options contained in the bill to identify implications for U.S. trade policy. We do not comment on the overall merits of any of the particular options.

Title II - Statehood Option

The trade policy aspects of this option, as currently drafted, are generally quite limited. We note, however, that the legislation refers to the possibility that additional proposals may be forthcoming; when these are available for review, they may require further analysis and comment.

Section 16(c) of Title II provides that omnibus legislation should be developed which would, inter alia, assure continuity in the treatment Puerto Rico currently receives as a coffee producer.

Puerto Rico, although part of the United States customs territory for other purposes, currently is exempt from the requirements of the International Coffee Agreement (ICA). As a result, Puerto Rico is allowed to import coffee from countries which are not members of the ICA, despite the United States being a party to the agreement (through September 30, 1989).

Further, since 1930, Puerto Rico has been allowed to maintain its own tariff regime on coffee, under which it charges a duty on all coffee imports, including those from the United States (currently at $1.40 cents per pound). The Puerto Rico Coffee Board reported that duties collected on coffee imports into Puerto Rico in 1988 totaled nearly $11.1 million.

This section of the bill would continue the above practices after Statehood. A preliminary review of GATT precedent and provisions indicates that because Puerto Rico already is a part of the U.S. customs territory and subject to GATT obligations, Puerto Rico's GATT obligations should not change with Statehood or under enhanced Commonwealth.

With respect to Puerto Rico's ability to import coffee from non-U.S. sources, if the United States is a party to the ICA at the time of Puerto Rico's admission to the Union, Puerto Rico would have to abide by the requirements of the agreement, just as any other state would. Specifically, Puerto Rico would be able to import coffee only from coffee-producing countries which are members of the ICA if the agreement has quota requirements, as it has had in the past.

This section of the bill also calls for a continuation of current treatment of Puerto Rico with respect to alcohol excise taxes. While a matter within the Department of Treasury's immediate jurisdiction, USTR would note that the "cover over" of $10.50 per gallon excise tax to Puerto Rico was authorized at the same time that duty-free treatment of rum imports from beneficiaries of the Caribbean Basin was provided under the Caribbean Basin Economic Recovery Act (CBERA).

We believe that any change in current practice regarding this "cover over" could lead to pressures to discontinue duty-free treatment for rum under the CBERA. U.S. imports of rum from the Caribbean Basin in 1988 were $6.8 million, or 66 percent of the $10.3 million in total U.S. imports of the product (from foreign sources). Shipments of rum from Puerto Rico were valued at $97.5 million in 1988.

Title III - Independence Option

Subparagraph (b) of section 5.3 provides that, "During the first twenty years following the proclamation of independence, the United States shall not impose trade barriers or quotas of any kind on merchandise and articles coming into the United States from the Republic of Puerto Rico."

This provision, if constitutionally valid and binding on future Congresses, would eliminate the ability of the United States, for the designated 20-year period, to take action under our trade laws against a sovereign country, regardless of the acts, policies or practices undertaken by that government. Such actions could include violation of trade agreements, discrimination against U.S. firms or other unreasonable actions that would burden or restrict U.S. commerce.

Moreover, Puerto Rican products, and third-country products shipped through Puerto Rico, would be exempted from (1) U.S. actions under the "escape clause" provisions of our trade law intended to permit U.S. industries to adjust to increased imports, (2) quotas, and (3) tariffs. In addition, the provision fails to specify how exports from the United States to Puerto Rico would be treated after the proclamation of independence.

Section 5.3, as drafted, could lead to significant transshipment of goods through Puerto Rico, allowing such imports to avoid U.S.

tariffs and quotas, where applicable, altogether. This situation could be particularly problematic in the case of a sector such as textiles and apparel, where the application of quotas is widespread and tariff levels are moderately high. Both paragraphs specify treatment for goods merely "coming into" the United States "from" Puerto Rico. It is common practice in trade agreements to specify that goods must be "products of" the parties subject to the particular agreement, to ensure that benefits of the agreement accrue only to those articles in which the parties have a significant economic stake.

As currently drafted, the section also could result in significant diversion of trade and investment from other trading partners. By prohibiting the application of any trade barriers or other restrictions on U.S. imports from Puerto Rico, and by not specifying that such imports must be products of Puerto Rico, the bill would provide treatment which is much more favorable than that given to any developing country, under the Generalized System of Preferences (GSP) or the Caribbean Basin Economic Recovery Act (CBERA).

These provisions, if enacted, could result, in particular, in substantial diversion of trade from the nearby Caribbean Basin. Under the Caribbean Basin Initiative (CBI), 22 countries in the Caribbean and Central America receive duty-free treatment for a range of their exports to the United States market. The CBI program was enacted by the CBERA in 1983 to stimulate trade and investment in the area, and to contribute to the development of a more stable and prosperous Caribbean Basin region. The CBI remains in effect through September 30, 1995. Legislation currently is before Congress (H.R. 1233/S. 504) to extend the CBI program virtually indefinitely and to make certain other improvements in the program.

In addition to the limitations on our actions under U.S. trade laws, section 5.3 may violate our international obligations to provide most-favored nation (MFN) treatment to the majority of our trading partners. Among other actions, the United States would be required to seek a waiver of our obligations under the General Agreement on Tariffs and Trade (GATT). The likelihood of our succeeding in this endeavor is minimal because of the long duration of the exemption and its limitation to one country. The action would also trigger U.S. obligations to extend unconditional MFN tariff and trade treatment to certain trading partners under existing friendship, commerce and navigation treaties and bilateral free trade agreements.

Finally, the term "trade barriers" is extraordinarily broad and could cover provisions ranging from intellectual property laws to investment regulations and similar provisions.

Title IV - Enhanced Commonwealth Option

Subparagraph (a) of Subpart 7 of this title would allow Puerto Rico to impose tariffs on imports into the island in addition to duties applied to goods entering the United States customs territory. Although this section expresses an intent to be consistent with U.S. international obligations, it is imperative that it be so.

Under the GATT, the total charges imposed on imported goods are not to exceed the rate notified under Article II of the agreement. As there are few "unbound" items in the U.S. tariff schedule (imports of coffee being a specific exception), should Puerto Rico impose a higher duty on products imported into the Commonwealth, the amount of such duty would have to be subtracted from the general duty paid. If this is not done, the U.S. would owe trading partners compensation for the adverse effect which the additional duties might incur on their exports to the United States. Paying such compensation could have serious revenue implications and administrative problems are likely.

Alternatively, for a few items (such as computer parts under a bilateral trade agreement with Japan), the U.S. GATT-bound tariff rate on items is higher than the tariff actually being applied to the product in question. In such cases, Puerto Rico could apply duties in addition to those imposed by the United States, but only up to the level of the tariff which the United States has bound in the GATT. No violation of U.S. international obligations would occur under these circumstances. It should be borne in mind, however, that such instances are limited.

Subparagraph (b) of this Subpart would require the President to seek participation by the Commonwealth in the process leading to negotiation of international trade agreements. It would further require consultations with the Governor of Puerto Rico on the anticipated effects on the economy of the island of any proposed tariff rate change resulting from such negotiations. These provisions, in our view, would extend unusual privileges to the Commonwealth and could impair the President's ability to negotiate international trade agreements. Participation by the Commonwealth, as opposed to consultation, would be burdensome both for the U.S. Government and the Commonwealth.

The final subparagraph under this Subpart would require the U.S. Government to seek to obtain favorable tariff treatment for exports from Puerto Rico and to encourage other countries to designate Puerto Rico as a beneficiary under their respective GSP programs. While the Administration may be willing to undertake such efforts, we note that other governments may be reluctant to grant preferential tariff treatment to a jurisdiction which lies within the U.S. customs territory.

It seems most appropriate to consider such a provision within the "independence" option. In the event of independence, Puerto Rico could apply for beneficiary status under the preferential trade programs which the United States and other governments already have in place for developing countries. The U.S. could also give consideration to including Puerto Rico as a beneficiary under the Caribbean Basin Initiative (CBI), if Congress provided the authority to consider the island as a beneficiary of the program.

Subpart 10 under this title also contains provisions which affect U.S. trade policy with respect to the protection of intellectual property rights. This section of the legislation would make two significant changes to Title 17 of the United States Code (the copyright law). First, it would create a design right available exclusively for designs of Puerto Rican origin; second, it would exempt mask works of Puerto Rican origin from the reverse engineering and first sale provisions of the Semiconductor Chip Protection Act of 1984. We have serious concerns regarding these intellectual property provisions since they would be limited to one jurisdiction and would be inconsistent with our international obligations.

The Administration has recently proposed legislation to provide design protection throughout the United States. We believe that Puerto Rico's legislation should conform to this proposal.

Further, amending U.S. copyright law to provide special protection applicable solely to works or designs of Puerto Rican origin could violate our international obligations under the Berne Convention for the Protection of Literary and Artistic Works, which came into force for the United States on March 1, 1989.

This convention contains provisions that apply to works of applied art and industrial designs. It requires that, to the extent such works are protected by a member state's copyright law, they must enjoy a 25-year term of protection, and works from other member states are entitled to national treatment.

Even if the protection applied to all designs, for example, the term specified in S. 712 is too short and the national treatment issue is not addressed. The Berne Convention also prohibits the imposition of mandatory formalities such as a notice of protection as contemplated in S. 712.

The mask work provision in S. 712 would exempt mask works developed in Puerto Rico (i.e., those with over 50 percent of the development cost incurred in Puerto Rico) from the reverse engineering and first sale provisions of the Semiconductor Chip Protection Act of 1984. These provisions are a critical part of the balance of that legislation. They are widely viewed as very important for promoting competition in the semiconductor industry by permitting research and development based on prior designs and to enhance improvements in technology.

The proposed exemption for Puerto Rican-origin mask works from the reverse engineering and first sale provisions would make it more difficult for designers to build on prior work and would impede development of the technology. It would also provide an inducement for U.S. industries in this sector to move to the Commonwealth and gives the appearance that Congress is significantly favoring the Commonwealth over the fifty states.

I appreciate the opportunity to express USTR's views on the trade-related provisions of S. 712.

OFFICE OF THE UNITED STATES
TRADE REPRESENTATIVE
EXECUTIVE OFFICE OF THE PRESIDENT
WASHINGTON
20506

July 24, 1989

PUERTO RICO STATUS

Legislative Suggestions
(Based on 7/21/89 6:30 p.m. Draft)

Statehood

Page 19, lines 12-15 and 22-24:

Policy comment: We note that the current draft drops any reference to the issue of whether Puerto Rico may continue levying a tariff on interstate shipments of foreign-origin coffee after Statehood. The status of this right is unclear, since the courts held that Puerto Rico's change in status from a territory to a Commonwealth did not affect its ability to impose a tariff and the draft language (lines 12-15) is ambiguous.

If we assume that silence translates to maintaining the status quo, USTR requests that Congress make an explicit determination on this issue. We recognize that Puerto Rico's ability to levy the tariff on interstate shipments of coffee is a question for Congress to decide. However, strictly as a policy issue, we believe that permitting a State to levy its own tariffs, even if limited to imports from other States, is highly undesirable and sets an unfortunate precedent. Having a tariff only on foreign coffee imports, however, would be useless and would not protect the Puerto Rican industry from transhipment of coffee from the other fifty States. In addition, Puerto Rico's continuing to levy a tariff on imports of foreign-sourced coffee may lead to an international trade challenge. If successful, the United States would owe U.S. trading partners compensation for the adverse effect caused by the tariff on their export interests.

If it is decided that the coffee tariff ought to be retained in some form, we could support retaining it only for an appropriate transitional period, during which it would be phased down to zero, the level of the federal tariff on coffee. We believe that this transitional phase-out should occur under either Statehood or Commonwealth, as we basically would like to see the practice discontinued.

If the legislation, as currently drafted, would permit Puerto Rico to continue levying the coffee tariff, we recommend the following report language be adopted by the Congress:

Coffee (Report language):

It is the expectation of this Committee, in view of Puerto Rico's inclusion in the U.S. Customs territory under its current status, and because the United States has applied the General Agreement on Tariffs and Trade (GATT) to Puerto Rico since January 1, 1948, that Puerto Rico's GATT obligations should not change under either Statehood or Commonwealth. Nevertheless, Congress will make a determination whether Puerto Rico would be authorized to continue levying a tariff on coffee imported from other States if Statehood is selected. If Congress deems that such authority is appropriate, the Congress shall authorize the tariff as a transitional measure only, specifying a mutually agreeable phase-out schedule.

With respect to the International Coffee Agreement (ICA), the Committee expects that Puerto Rico, if a State, would abide by the requirements of the ICA, as they apply to the United States generally, at the time it is admitted to the Union. Specifically, Puerto Rico would be able to import coffee only from coffee-producing countries which are members of the Agreement, if the ICA has quota requirements, as it has had in the past.

Independence

Page 34, Section 316, lines 4 - 22.

Lines 4 - 6: No objection.

Line 8: Substitute "recommendations" for "provisions." We believe that any such recommendations developed by the Joint Transition Commission should be forwarded to the United States Trade Representative and to the House Ways and Means and Senate Finance Committees for appropriate consideration and action. This procedure should be specified in the statute, such as in the following new sentence that would be inserted at line 10 after ". . .Independence.":

> "All such recommendations should be forwarded to the United States Trade Representative and to the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives for consideration and appropriate action."

Lines 10 - 12:

Free Trade Agreement:

This section should specify Congressional willingness to examine a free trade agreement negotiated under the procedures enumerated in section 1102(c) of the Omnibus Trade and Competitiveness Act of 1988. Since that authority expires as of June 1, 1993, however, Congress in this bill may want to specify a longer time frame for consideration of such an agreement with Puerto Rico. We suggest the following language:

> "Congress expresses its willingness to examine a free trade agreement reached between the United States and Puerto Rico under the procedures specified in section 1102(c) of the Omnibus Trade and Competitiveness Act of 1988, if such an agreement is negotiated. For purposes of this section, the President may enter into such a bilateral trade agreement with Puerto Rico until ____ (date) ____."

Lines 12 - 16:

This provision should be clarified to authorize the President to designate Puerto Rico as a beneficiary under the CBERA, as follows:

> [Line 13] ". . .and, provided that Puerto Rico is found to meet all criteria for eligibility as set out in sections 212 (b) and (c) under the Caribbean Basin Economic Recovery Act, the President is authorized to designate Puerto Rico as a beneficiary country. Section 212 (b) is amended to include "Puerto Rico" in the list of countries that the President shall consider as such beneficiary countries."

Lines 17 - 22:

We have no objection to this section. However, making the provision a sense of the Senate, as follows, may avoid a separation of powers difficulty here:

> (c) In order to assist Puerto Rico subsequent to the Proclamation of Independence, it is the sense of the Senate that the President should take steps to encourage favorable tariff treatment by other nations of exports from Puerto Rico and should also encourage other countries to consider Puerto Rico as a developing area for purposes of their respective Generalized Systems of Trade Preferences schemes.

Commonwealth

Section 406, pp. 43, line 26 - 44, lines 1 - 23.

Additional Tariffs:

The language on page 44, lines 2 - 8 is unacceptable, particularly the reference to levying additional tariffs on goods "transhipped" through Puerto Rico (line 5). Moreover, the necessity for Puerto Rico to honor the international obligations of the United States should be featured more prominently than is the case in this paragraph.

Page 44, lines 2 - 8 should be replaced by the following:

> "1. As strictly limited by the international obligations of the United States, the Commonwealth of Puerto Rico is authorized to impose tariff duties on foreign origin products imported into Puerto Rico from outside the customs territory of the United States. Such tariff duties may be in addition to the general tariff duties imposed by the United States if such general tariff duties are not subject to U.S. international obligations, or in cases where the general duty is applied at a rate below that which is subject to U.S. international obligations. In the latter case, the combined duties shall not exceed the level for which a U.S. international obligation exists."

Participation by the Commonwealth in International Trade Negotiations:

Page 44, lines 9 - 17:

The language in lines 12 - 17 would establish a more privileged status for Puerto Rico than currently exists for any of the States. USTR is willing to consult voluntarily with the Governor of Puerto Rico, as we do with other State Governors, but the President should not be mandated to do so, as this language would stipulate. The following language should be substituted for that in lines 12 - 17:

> "(e) During the negotiation of any trade agreement under subsections (a), (b) and (c), it is the sense of the Senate that the President should consider the effects of any proposed tariff rate or any proposed changes in non-tariff measures on the economy of Puerto Rico and consult with the Governor of the Commonwealth of Puerto Rico concerning such potential impact before concluding international trade negotiations."

Page 44, lines 18 - 23:

Eligibility for Generalized System of Trade Preferences:

Substitute the following for lines 18 - 23:

> "It is the sense of the Senate that the President should seek to obtain favorable treatment from foreign countries for exports from the Commonwealth of Puerto Rico and should take steps to encourage other countries to consider Puerto Rico as a developing area for purposes of their respective Generalized Systems of Trade Preferences schemes, and any such regional systems of trade preferences."

STATEMENT OF ARNOLD R. TOMPKINS, ACTING ASSISTANT SECRETARY FOR PLANNING AND EVALUATION, DEPARTMENT OF HEALTH AND HUMAN SERVICES

Mr. TOMPKINS. Mr. Chairman and members of the committee, I appreciate the opportunity to appear before the committee to provide information on the impact of Senate bill 712.

The operation of the Department of Health and Human Services programs for Puerto Rico, this department provides approximately $2.6 billion per year to residents of Puerto Rico. Most of this $2 billion is for social security benefits.

Each of the three options set out in S. 712, statehood, independence, and enhanced commonwealth status would have significant but varying effects on HHS programs. My written statement summarizes these. I will not review all of them at this time. However, I would like to indicate briefly our major concerns under each of the three options.

Statehood. The greatest change of the statehood option under S. 712 would be the extension to Puerto Rico of the supplemental security income program, SSI. We are concerned with both the budgetary impact, perhaps about $800 million per year, and the appropriateness of the relatively high SSI benefit levels for Puerto Rico. By extending SSI, the number of beneficiaries in Puerto Rico would go from $34,000 to approximately $185,000 and benefits would increase markedly, for example, from about $60 for a couple to over $550.

Enhanced commonwealth. Over time the effects of the enhanced commonwealth option would be similar to those of the statehood and S. 712 would also remove certain federal funding limits as would statehood. Our primary concern with the extension of SSI, although here S. 712 proposes to phase SSI in over a nine-year period.

Independence. The independence option would essentially remove HHS from program administration of most of our programs and provide program funds at current levels to Puerto Rico through a block grant.

Our primary concern with the independence option is in determining the financial responsibility for social security and Medicare and the rights of beneficiaries and workers in Puerto Rico under this under those programs. Many billions of dollars are involved. A very rough estimate of the social security contributions to be transferred under the bill is about $8 billion. In addition, we would pay about $2 billion a year for current beneficiaries with no offsetting revenues from social security taxes.

One concern is that the bill provides no protection for Puerto Rican workers who are near retirement but not receiving benefits at the time of independence, even though they have contributed to the social security and will depend heavily on its benefits.

The independence option raises substantial concerns for Medicare as well. Here, too, we need to determine how best to address employee-employer contributions to Medicare, but also what services, if any, can we cover to Puerto Rico and what costs and controlling quality insurance mechanisms should be in place, if any.

The Medicare contributions are handled compared to the social security. An additional $2 billion is involved.

Conclusion. The issues we have outlined are complex. We look forward to working with the committee to resolve them, and we will be happy to answer any questions you may have and provide any additional information you may require.

[The prepared statement of Mr. Tompkins and a subsequent submittal follows:]

STATEMENT BY

ARNOLD R. TOMPKINS

ACTING ASSISTANT SECRETARY FOR
PLANNING AND EVALUATION

DEPARTMENT OF HEALTH AND HUMAN SERVICES

BEFORE THE COMMITTEE ON ENERGY AND NATURAL RESOURCES

UNITED STATES SENATE

JULY 13, 1989

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to appear before the committee to provide information on the operation of the Department of Health and Human Services (HHS) programs in Puerto Rico and on the impact of S. 712 on those programs.

This Department provides approximately $2.6 billion per year either directly to or on behalf of residents of Puerto Rico or in payments to the Government of Puerto Rico for Federally assisted benefit programs. Most of this--$2 billion--is for Social Security benefits.

Each of the three options set out in S. 712 -- statehood, independence, and the proposed "enhanced commonwealth" status -- would have significant, but varying, effects on the funding and operation of HHS programs in Puerto Rico. I will first summarize the principal effects of the three options and then briefly review certain issues related to each major program affected.

EFFECTS OF MAJOR OPTIONS

Statehood

The single greatest change of the statehood option under S. 712 for HHS would be the substitution of the Supplemental Security Income program (SSI)--which is 100 percent Federally funded and has far higher eligibility and benefit levels--for the current Federally assisted program for the aged, blind, and disabled, for which Federal payments to Puerto Rico are limited by statute.

Apart from this, the primary effects of statehood would be on the Federal funding levels of several other HHS entitlement programs -- Aid to Families with Dependent Children (AFDC), Medicaid, Foster Care, and the Social Services block grant. As S. 712 is currently drafted, the allotment formulas for Puerto Rico under these programs would be modified to be the same as those for the 50 states.

The aggregate costs to the Federal government of the statehood option could be an additional $1 billion per year or more. Let me emphasize that this estimate is preliminary. The actual costs would depend, in part, on whether Puerto Rico modifies its AFDC and Medicaid programs.

Statehood would have little effect on Social Security. It could, however, substantially increase the cost of Medicare unless the current method of reimbursing Puerto Rican hospitals is maintained.

Enhanced Commonwealth

Over time, the fiscal effects of the "enhanced commonwealth" option would be similar to those of the statehood option, because S. 712 would remove Federal funding limits for the same programs as under the statehood option. The programs, however, would be phased in over periods of five years--for AFDC and Medicaid--and nine years for SSI. There appear to be no increases in revenues to offset even partially the increased program funding.

Independence

The independence option would essentially remove HHS from program administration, and provide program funds at current levels to Puerto Rico through a block grant for ten years--with decreasing amounts for another ten years thereafter. The precise nature of the block grant is, however, unclear and needs to be specified in the legislation.

Our primary concern with the independence option is in determining financial responsibilities for Social Security and Medicare and the rights of beneficiaries and workers in Puerto Rico under those programs. Many billions of dollars are involved.

Let me now discuss briefly key aspects of S. 712 on the individual programs.

EFFECTS ON MAJOR HHS PROGRAMS

Aid to the Aged Blind and Disabled and SSI

Both the statehood and "enhanced commonwealth" options under S.712 would substitute SSI for the current program providing assistance to low-income aged, blind, and disabled persons. The current program--Aid to the Aged, Blind and Disabled (AABD)--is jointly funded by the Federal government and the Commonwealth, while basic SSI is Federally funded and provides benefits, set by statute, directly to low-income elderly and disabled persons.

The replacement of the AABD program with SSI has significant budgetary consequences. The Federal share of the current program is about $18 million, while the cost of full extension of SSI would be approximately $800 million for the first full year of implementation--based on estimated FY 1992 benefit levels--and would increase in subsequent years due to the indexing of benefits.

In addition to the budget consequences, there is a question about the appropriateness of SSI's benefit levels to Puerto Rico. Under SSI, benefit levels are determined nationally and in FY 1989 are set at $553 per month for a couple with no other income. In contrast, the benefit level set by Puerto Rico under the current program for the same couple is $64 per month plus 50 percent of actual shelter costs. Thus, there would be a dramatic increase in benefits. Furthermore, the eligibility rules set by Puerto Rico entitle about 41,000 persons to payments under the current program, while the number of people eligible for SSI would be about 185,000--an increase of about 144,000 beneficiaries. Clearly, in terms of benefit levels and number of beneficiaries, extension of SSI would constitute a major change for the individuals affected and the communities of Puerto Rico--with potential effects on the Puerto Rican economy and social institutions.

Because the AABD program would be terminated under the independence option and funding provided for this and most other programs under a block grant, the independence option does not raise these concerns.

Aid to Families with Dependent Children

Puerto Rico participates in the Aid to Families with Dependent Children (AFDC) program and the related Emergency Assistance program. As with the 50 states, Puerto Rico establishes its AFDC benefit levels, and the Federal government provides matching funds established in law as an entitlement to participating governments. In Puerto Rico's case, the matching rate is statutorily set at 75%, while matching rates for the states can go as high as 83%.

A second difference from state programs is that, while Federal matching for state program expenditures is "open ended," Federal matching for Puerto Rico is limited statutorily to $82 million for AFDC, AABD, and Foster Care. We estimate that Puerto Rico will be at its funding ceiling for these programs in FY 1990 and beyond. Puerto Rico currently spends about $78 million for AFDC and therefore receives $56 million in Federal matching funds.

Under either the statehood or "enhanced commonwealth" options, the ceiling would be removed and expenditures would be matched at a higher rate--83%. Thus, even without changing benefits and eligibility rules, Federal reimbursement would increase by about $6 million. However, with increased matching and no cap on the expenditures, Puerto Rico might well modify its AFDC program in a manner that would substantially increase Federal reimbursement. If, for example, Puerto Rico were to double its benefit levels as the 1987 GAO study indicated it might, there would be a corresponding doubling of Federal program costs. In FY 1989, the maximum AFDC benefit in Puerto Rico for a three-person family was $90 per month compared to the median level for states of $360.

Of course, the interrelationships between AFDC, SSI and Medicaid will influence how Puerto Rico structures its AFDC program as well as our estimates of participation and costs for AFDC and the other two programs.

Medicaid

The Medicaid program is similar in concept to AFDC in that, by using a formula based on per capita income in each state, it reimburses states from 50 to 83 percent of their medical expenditures for eligible persons. Puerto Rico's matching rate is limited statutorily to 50 percent and total Federal matching of Puerto Rican medical and administrative expenditures is capped at $79 million for FY 1990 and beyond.

Puerto Rico reported Medicaid expenditures for FY 1988 of about $129 million for medical services and $18 million for administration. The reported expenditures entitled Puerto Rico to reimbursement of $79 million allowed under the ceiling.

Under statehood or "enhanced commonwealth", as S. 712 is currently drafted, the cap would be removed and the matching rate would rise to 83%--the maximum allowable rates for states. Even without any changes in the services provided under its Medicaid program, Puerto Rico would be entitled--based on the expenditures for FY 1988--to at least an additional $55 million. However, Puerto Rico would almost certainly make fundamental changes in its Medicaid program. These would likely include: reporting more of its medical expenditures (the incentive for full reporting is minimal given the ceiling); increasing Medicaid eligibility to cover the additional 144,000 persons made eligible as SSI beneficiaries; and expansion of Medicaid-covered services. However, some of the increased costs of these changes might be offset partially by stricter eligibility determinations, as we would more closely monitor Puerto Rico's Medicaid program.

The variety of possible changes to the Medicaid program in Puerto Rico make it difficult to estimate the budgetary impact or ultimate composition of the program under statehood or "enhanced commonwealth" status, although the GAO study estimated an increase for FY 1984 of $326 million if the ceiling were removed.

Foster Care and Adoption Assistance

The Foster Care and Adoption Assistance programs provide Federal matching on a statutory entitlement basis of state expenditures for children removed from AFDC families into foster care or adoptive placements. Puerto Rico is eligible to participate in the program, but does not do so because, under current law, the AFDC, AABD, and Foster Care programs are subject to the statutory ceiling I mentioned earlier and Puerto Rico uses virtually all the funds under the cap for its AFDC and AABD programs.

If the ceiling were to be removed, as under either the statehood or "enhanced commonwealth" options in S. 712, Puerto Rico could be expected to participate in the program. The cost to the Federal government would be about $2 million initially, increasing to about $4 million annually. We do not anticipate significant administrative problems in providing for Puerto Rico's participation in this program, or in implementing changes in the AFDC or Medicaid programs.

Social Security

Currently, Puerto Rico employers and employees are covered by Social Security--old age and survivors and disability insurance--in the same manner as employers and employees in the 50 states. Under either statehood or "enhanced commonwealth" status, there would be no substantial change in this program. However, the changes under the independence option would have major implications for workers and future Social Security beneficiaries and for the Social Security trust funds.

S. 712 provides that beneficiaries who are receiving Social Security benefits would continue to receive benefits from the U.S. Social Security System. Also, funds attributable to the contributions made by or on behalf of employees who are residents of Puerto Rico at the time of independence but who are not yet eligible for Social Security benefits would be transferred to Puerto Rico for use in establishing a social security system for the new republic. (A very rough estimate of the Social Security contributions to be transferred under the bill would be about $8 billion.)

One issue not addressed directly by the proposed bill is how to treat Puerto Rican workers who are near retirement but not yet receiving benefits at the time of independence. As currently drafted, the bill provides no protection for these workers--even though they may have contributed to Social Security for their entire working lifetimes and will depend heavily on Social Security benefits for their financial support during retirement.

Social Security benefits are largely financed from the taxes of current workers and their employers. Since, under S. 712, workers in Puerto Rico would no longer be covered under Social Security after independence and would no longer pay Social Security taxes, the Social Security trust funds would have to bear the entire costs of paying benefits to Puerto Rican residents who are became for such benefits before independence. Monthly

Social Security benefits paid in December 1988 for Puerto Rico totaled $158 million. This cost would not diminish rapidly after independence.

Finally, from an administrative standpoint, it is important to understand that the Social Security Administration can estimate but cannot determine the actual amount of Social Security contributions paid by employees and employers in Puerto Rico. SSA does not have reliable residency information on these workers. Therefore, the provision in S. 712 requiring the transfer of actual amounts of contributions to Puerto Rico would need to be revised.

The Social Security provisions of the bill that would apply if Puerto Rico's residents chose independence represent one of a number of potential options for determining financial responsibilities and the rights of Social Security beneficiaries and workers covered under Social Security in Puerto Rico. The handling of Social Security and Medicare are complex issues that depend, in part, on Puerto Rico's plans for its own social security and Medicare-like systems. The effects of this and other options need to be explored fully to assure that equity, financial, and administrative issues are dealt with in the most appropriate manner.

Medicare

Under the Medicare program, employees in Puerto Rico, as in the rest of the country, contribute to the hospital insurance trust fund through the payroll tax--currently set at 1.45% of covered wages. Beneficiaries also pay premiums into the supplemental medical insurance trust fund for physicians' services. Beginning in 1990, they will also be subject to the premiums under the Medicare Catastrophic Coverage Act.

Payments for hospital, physician, and other Medicare services are made to health care providers in Puerto Rico substantially as they are for hospital and other health providers in the United States. However, there is one major difference. Under Medicare's prospective payment system, the rate of reimbursement for hospitals in Puerto Rico is different than for the 50 states. Whereas the latter are reimbursed at a national rate, Puerto Rican hospitals are reimbursed at a blended rate based 25% on the national rate and 75% on the local rate in Puerto Rico. This is indexed to adjust for the significantly lower cost of providing medical care in Puerto Rico.

If Puerto Rican hospitals were to be paid as the hospitals in states are now paid, payments would be 36% higher than current payments. The effect would be an increase to the Federal budget of approximately $48 million. Since hospital costs are substantially lower in Puerto Rico, this could result in overpayment of Puerto Rican hospitals.

The independence option raises more substantial concerns. As with Social Security payments, there are complex and fundamental issues to be resolved. One is how best to address employee and employer contributions to Medicare. A second major issue is how Medicare beneficiaries would have their health care services paid for. For example, should we continue to operate a Medicare program in Puerto Rico?

Other Programs

Puerto Rico already participates on an equal basis with the states in many of our block, formula, and project grant programs. Therefore, neither statehood nor "enhanced commonwealth" raises significant issues, although there would be some minor changes in allotment formulas of several programs that would increase funds going to Puerto Rico and decrease funds to the other states, assuming a constant appropriation. For example, Puerto Rico's share of the Social Services Block Grant would rise by about $22 million and the shares of other states would be reduced by an equal amount.

Under independence, we are concerned with the disposition of loans to individuals--for example for health professions education--or to entities --for example, loans for hospital construction.

Under S. 712's "enhanced commonwealth" option, HHS and other Federal agencies would, upon application by the Commonwealth, be authorized to consolidate certain of these grants in order to allow Puerto Rico additional flexibility in allocating Federal funds and to reduce administrative requirements. There is a similar provision already in effect for other territories. If applied to Puerto Rico, it would have no budgetary impact and would not present a significant administrative problem. However, based on our experience with the territories and with state block grant programs, we have some recommendations for modifications to the approach outlined in the current legislation. For example, one approach would be to allow consolidation only of those programs where funding levels are known in advance--primarily formula and block grant programs. Another would be to exclude certain grants. For example, we believe that biomedical research grants to institutions in Puerto Rico for research to fulfill U.S. national objectives should not be included in the consolidated grant, nor in the block grant (or grants) envisioned under the independence option.

CONCLUSION

As you recognize and as I have indicated today, there are significant issues raised by S. 712 that require resolution before the bill is made final.

Thank you for this opportunity. I will be happy to answer any questions you may have and provide any additional information you may require.

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Washington, D.C. 20201

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SENATE COMMITTEE ON
ENERGY AND NATURAL RESOURCES
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WASHINGTON, D.C. 20510

The Honorable J. Bennett Johnston
Chairman, Senate Committee on
Energy and Natural Resources
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed is a summary of concerns of the Department of Health and Human Services with respect to S. 712 (providing for a referendum on the political status of Puerto Rico), including recommendations for revisions of the bill to meet these concerns.

We appreciate the opportunity to work with the Committee in its development of this legislation.

The Office of Management and Budget has advised that there is no objection to the submission of these comments from the standpoint of the Administration's program.

Sincerely,

Ann Segal for

Arnold R. Tompkins
Acting Assistant Secretary
for Planning and Development

Enclosure

cc: The Honorable James A. McClure

HHS CONCERNS WITH REVISED S. 712 (PROVIDING FOR A REFERENDUM ON POLITICAL STATUS OF PUERTO RICO)

Statehood: Laws in effect: sec. 208 (pp. 11-12):

We believe the intent of the second and third sentences in subsection (a) is to provide that, effective November 19, 1993, all federal laws (other than those inapplicable to Puerto Rico solely on the basis of particular geography) shall have the same force and effect in Puerto Rico as in any other state. Subsection (b) provides for review and recommendations by a Commission on Federal Laws as to what changes in federal laws would be appropriate. We note these concerns:

1. Flawed drafting: The second sentence of subsection (a), as drafted, does not achieve the presumed intent, as stated above: read literally, it would make programs such as AFDC and Medicaid unavailable to Puerto Rico. The third sentence, as drafted, is confusing, and the reference to provisions inapplicable to Alaska or Hawaii is superfluous; we recommend that it be revised by striking "which does not apply" through the end of the sentence and inserting instead "which is inapplicable to Puerto Rico solely on the basis of particular geography shall continue to be inapplicable unless specifically extended by Congress.".

2. Use of November 19 as the changeover date: Choice of a date in the middle of a month will substantially increase the administrative difficulty of the changeover, the likelihood of accounting and auditing errors, and the like. We recommend making the changeover date the beginning of a quarter of the federal fiscal year; failing that, we would at the least want the change to fall at the beginning of a month. (This recommendation addresses only HHS programs. We understand that a different changeover date or dates may be needed for other purposes; for example, the Treasury Department has indicated that the changeover for purposes of income tax provisions must be January 1.)

3. Timing of changes in federal laws applicable (or inapplicable) to Puerto Rico: This section as drafted could result in inappropriate treatment of the State of Puerto Rico under federal laws for what could be an extended period. All federal laws (subject to certain exceptions) would apply to Puerto Rico as to the several states immediately upon Puerto Rico's admission into the Union. The Commission on Federal Laws would then have until January 1, 1994 to submit its recommendations as to which of these laws should not so apply, and substantial additional time would elapse before federal legislation could be enacted making the appropriate changes.

We would recommend an alternative timetable, in order to prevent inappropriate application to Puerto Rico of a statutory scheme not in effect prior to statehood. We would recommend that the bill be revised to require that the review of the Commission on Federal Laws take place in the interim between completion of the referendum and the effective date of statehood, and that the Commission's recommendations be final before such date. The bill could further provide that, where the Commission found that application of the law in effect for states would be inappropriate for Puerto Rico, the law applicable to the Commonwealth of Puerto Rico could be continued in effect during a transition period ending on the effective date of legislation responding to the Commission's concerns or, if no such legislation was enacted, the end of the first Congress beginning after the effective date of statehood.

4. Comparison to sec. 213: We do not understand what, if any, is the difference between secs. 213 and 208 with respect to HHS programs listed in sec. 213(c) (other than the proviso concerning Medicare).

Statehood: effect on certain federal benefit programs: sec. 213 (pp. 16-18):

Sec. 213(c) provides for continuation of current treatment of Puerto Rico under specified public assistance programs until November 19, 1993, at which time full State-like treatment would become effective, with a proviso that "reimbursements under Medicare shall not exceed the actual cost of providing equivalent health care to the levels of care provided in the several contiguous States". We note several concerns:

1. Use of November 19 as the changeover date: This raises the same concerns noted above in our discussion of sec. 208.

2. Proviso concerning Medicare: We support the recognition that application of the Medicare program in Puerto Rico may need to be different in some respects from its application in the several contiguous states. However, we do not agree with the bill's approach of limiting reimbursements in Puerto Rico to actual cost. In recent years, in an effort to control costs in this program, major amendments have been made to the Medicare program, designed to force hospitals and other health care providers to control their costs, including substitution of a system of prospective payments tailored to specific diagnoses for the previous system of "reasonable cost reimbursement" of hospitals. We recommend that this proviso be deleted: we believe the Medicare issue should be dealt with by the mechanism provided in sec. 213(b), under which the

Department, in consultation with the Governor of Puerto Rico, would consider and make recommendations to the President as to what statutory or regulatory changes would be needed to properly achieve the application of the law in Puerto Rico, with regard to its economic, geographic, and cultural circumstances.

3. **Treatment of Supplemental Security Income (SSI): The reference to SSI on p. 17, lines 10-11 should be** deleted: SSI is not currently applicable to Puerto Rico. We also believe that the Commission on Federal Laws provided for in sec. 208(b) should consider the impact of the SSI program on Puerto Rico and whether any modifications in that program as it would apply to Puerto Rico would be appropriate, in light of the specific social and economic circumstances in Puerto Rico. It is not clear to us whether the bill as drafted permits the Commission to consider such questions in relation to the federal benefit programs, including SSI, enumerated in sec. 213(c).

Independence: Social Security: secs. 313 and 314 (pps. 32-33):

We recommend the following revisions to the bill, in order to eliminate ambiguities, and to provide for a clearer and more flexible timetable for the transition to Puerto Rico's separate social security system.

Sec. 313. Federal Programs.

On p. 32, line 2, strike "All federal programs" and insert instead "Except as otherwise provided in this title, all federal programs".

On p. 32, line 3, insert "certification of the" before "referendum".

On p. 32, line 11, insert "(other than those referred to in section 314(a))" after "All federal pension programs,".

Sec. 314. Social Security.

On p. 33, line 9, strike "Current provisions of the" and insert instead "The provisions of the Federal".

On p. 33, line 11, insert "in Puerto Rico as in the United States" after "shall apply".

On p. 33, line 17, insert after the period at the end "Such agreements shall be approved by the government of Puerto Rico and the government of the United States in accordance with their respective constitutions and statutory

processes. These agreements may provide for an earlier date for termination of the United States social security program in Puerto Rico than the date provided in subsection (a).".

On p. 33, lines 18-19, strike "This Task Force" and all that follows through "insured status" and insert instead "Such agreements shall take into account the interests of affected individuals who have at least 40 quarters of coverage".

On p. 33, line 19, strike "the Old Age" and insert instead "the Federal Old Age".

On p. 33, lines 21-22, strike "5 years subsequent to the certification of the referendum" and insert instead "the termination of the United States social security program in Puerto Rico".

Commonwealth: Consolidation of grant-in-aid programs: sec. 407 (pp. 44-45):

This provision would make applicable to Puerto Rico section 501 of P.L. 95-134, which permits consolidation of any or all grants to small insular territories (other than grants for the purpose of providing direct payments to individuals), and permits the affected territory to use the consolidated grant for any or all of the purposes of the individual grants so consolidated. We question the appropriateness of extending this authority to Puerto Rico. The purpose of this law was to permit small insular territories to make effective use of grant funds which, on a program-by-program basis, are in such small amounts that effective use is difficult or impossible. This concern does not apply with respect to Puerto Rico which, under applicable HHS programs, receives more federal funds than several of the smaller states.

The CHAIRMAN. Thank you very much, Mr. Tompkins.

Mr. Tompkins, you state the concern under the independence option that those who are nearing retirement would not be protected.

Now, I have suggested that one way to do it would be to pick a period of time, say three years under an independence option in which all programs, including social security, would continue with employers paying and in Puerto Rico paying in, and those employees continuing to be part of this system, continuing as if there were no independence for a period of three years at which time it would then cut off.

Now, dealing with that three-year period, would that solve your concerns?

Mr. TOMPKINS. That would solve our concerns as far as those that are receiving social security and at that point it may well solve the issue of the people coming in on it, say, the next two or three years, it would be important, but it would not still solve the problem of what do we do for the beneficiaries that are on right now. I mean——

The CHAIRMAN. As part of that, everyone who would be vested would continue to draw, and those during this, say, the three-year period, if that is the period we take, would also be able to vest during that three-year period.

Mr. TOMPKINS. They would be on the program until they die, in other words?

The CHAIRMAN. That is right.

Mr. TOMPKINS. That would sound fine to us. It would depend. It sounds fine. I would have to certainly go back to the department and to the administration and discuss that. It would cover a lot of our concerns, yes. It would more or less grandfather in the people we are concerned about. The additional problem maybe to Puerto Rico would be those that are—would vest after three years.

The CHAIRMAN. Now, after the three years the idea would be to pay to the new independent Puerto Rico an amount equal to that amount paid in by those employees, and together with interest thereon as a lump sum, as a lump sum perhaps paid over time so as not to be too big an outlay in one year, in order for Puerto Rico to be able to set up its own social security system as it wishes. Would that be workable?

Mr. TOMPKINS. It would be workable. I think we would try to use the three years to come up with that figure. There would be a great deal of concern both in the Social Security Administration as well as, I think, other parts of the department or of the administration as to what that big number would be because they would turn out to be a very, very large number, and we have to consider that such a large number with—you understand the social security system is a pay-as-you-go system. The young pay for the old.

The CHAIRMAN. Well, theoretically it is not.

Mr. TOMPKINS. In actuality that is what actually happens. So that lump sum would not then be replenished by workers putting in, younger workers putting in money.

The CHAIRMAN. But on the other hand, the obligation for those who would have vested after the three years would be relinquished.

Mr. Tompkins. I think we would just like to look at it and consult with you more on that and see what types of numbers you are thinking about.

The Chairman. Well, we are not thinking about numbers. We want the numbers from you really. We do not know the numbers.

Mr. Tompkins. Well, there is great concern by your committee and other committees as to what that number would be. I would venture as well that others in the administration would want to be consulted on what that number would be.

The Chairman. Well, we have consulted. Now, we are waiting for consultation back in the other direction. We have asked.

Mr. Tompkins. I think we have a group within the administration working on similar type proposals right now, Senator, and hopefully we will get back to you soon on what the types of things we would propose on that.

Senator McClure. Mr. Chairman, could I ask a question on the social security aspect.

The Chairman. Sure.

Senator McClure. There have been a majority of residents in Puerto Rico who could likely remain U.S. citizens. Is it possible to cut off future benefits to anyone who has contributed 40 quarters prior to independence?

Mr. Tompkins. Not that I presently know of. I think if you are a citizen of the United States, then you are eligible through 40 quarters, then the United States owes you benefits at the age that you become 65.

Senator McClure. A lot of this discussion may become theoretical if indeed that is the case, because I suspect any analysis is going to show that the majority, except those very recently employed, will have contributed for 40 quarters prior to the date of independence.

Mr. Tompkins. Maybe a substantial amount, yes, sir.

Senator McClure. Do U.S. citizens abroad contribute to social security?

Mr. Tompkins. If they so choose to do that. They do not have to. Depending upon—I am told that they would have to be in jobs that are covered by the social security system in order to be able to do that.

Senator McClure. If they are resident overseas, employed by nonresident corporations or entities, they are not residents of the United States. Neither they nor their employees nor their employers are residents of the United States. Do they contribute to the social security system today?

Mr. Tompkins. No.

Senator McClure. That would be the case in Puerto Rico after independence.

Mr. Tompkins. Yes, depending on how you would treat them as citizens. I mean, there are some provisions in the bill that speak of dual citizenship. I do not know how all of that would work out.

Senator McClure. Thank you, Mr. Chairman.

The Chairman. In your statement you say that the rough estimate of the value of social security contributions from Puerto Rico and to establish a system for the new republic is $8 billion.

Mr. TOMPKINS. We say $8 billion is what those that have not yet retired have contributed into the system. That is just what they have contributed. That does not account for any inflation or any interest or what have you. That is just plainly what our estimate of what it is, and even that estimate, we do have some problems with that as well. It is an approximation.

The CHAIRMAN. Well, what we want to do is, we want to get those costs not only in social security. I mean, we have got social security. We've got AFDC, Medicaid, all of these programs, and we have asked the administration to give us cost estimates of all of these, and we are looking, see, at the status quo as being the baseline and insofar as possible, we want there to be what has been called an even playing field or what we call a revenue neutrality between, at least in the transition period, between the commonwealth and statehood, and to the extent that we have to then know the cost of all of these programs, there are also some offsetting benefits of not having the liability on social security, and so you cannot say it is just a dead cost of $8 billion.

There is a future calculated benefit which has a present value, I would assume, on social security, and so we want to do that on all of these programs and then when we fashion our legislation, we would—for example on independence, if we give this amount of money, we are probably talking in independence about some kind of transition grant because these programs, I would think, after a period of time, say, three years, then all of the programs would begin to phase out, and the amount of the phaseout there would depend on how much is paid in on, say, social security, if you follow what I mean.

Mr. TOMPKINS. I understand. We have given you some estimates on what that would be in my written statement as far as AFDC and others would be concerned. He was just making a point to me. We could do that accurately, and we have attempted to do that so far in my written statement. Except for social security, it is difficult because the peculiarity in social security is we know where people work, but we do not know where people reside in a lot of instances, and so it is difficult to find the individual at times.

The CHAIRMAN. Now, is there any difficulty that you can see in phasing in programs? I mean, for example, if we are not going to require, under the Statehood Option, the people of Puerto Rico to pay Federal taxes for a period of time, I would think during that period of time in which there is no Federal tax, whatever that transition period is, that there should be no increase in Federal programs.

Mr. TOMPKINS. I think we would be in agreement with that.

The CHAIRMAN. There is no legal problem with that?

Mr. TOMPKINS. As far as I can ascertain. I think you would have to ask the Department of Justice. As far as we have talked about so far within the Administration has been looking at the idea of transitioning in, as expenditures are brought in, as expenditures are given out, there would be some revenues coming in.

Now, how that would transpire, we are not sure yet, but the premise would be that we would like to phase it in with revenues and with expenditures. And so, therefore, if your point is that there would be no revenues in the first three years, or what have you, then I think we would not like to bring in any increased expenditures at that point.

The CHAIRMAN. As I foresee it, under at least my own tentative view on Statehood is that we have some period of time—let us say, to pick a number, a couple of years, in which there is essentially no change: no change in 936, no change in the payment of Federal taxes, and no change in Federal programs. Because there has got to be an adjustment period here for the new State of Puerto Rico, for the Congress to reevaluate its situation with Puerto Rico. And then there has got to be a phase-out and phase-in period, in which the goal would be to be revenue neutral on all the programs. And that is what I would like to try to achieve.

And then, when we put that model in place, we would have people look at it and see would that work, or would it not work. And if it would not work, why not, and what changes have to be made, and what would they cost? I mean, we want to put workable options in place here.

Mr. TOMPKINS. We would be in complete agreement with that, particularly as it affects statehood, the SSI program would be one of those things we would want to look at during that transition period, how you phase that in as well.

The CHAIRMAN. Now, on independence, it seems to me what we ought to do is have also a period of about, I would say, three years on independence. And all these numbers are tentative, but I think you have got to have a longer period of no change under independence, because you have got to put in place a constitution, elect new officers. There would be a tremendous amount going on down there during this period of time. Then they would have to set up their programs to take the place of Social Security, et cetera.

Now, do you agree with me, by the way, on Social Security, that, while you are concerned about those people who are almost vested, at some point you have got to say people from this date backward have 100 percent coverage, from that date forward have absolutely no coverage?

Mr. TOMPKINS. I think what we are looking at is—it is difficult, Senator, for me to say what we would think, because I do not know what we think on this particular issue right now as far as the total Administration is concerned on this.

What I think—in the Department we have looked at options. One would be an option that you are speaking of. And trying to figure out what would be a reasonable amount of money that——

The CHAIRMAN. Yes, I am just talking a mechanical problem. I am not talking about picking the amount of time. But am I right that you have got to pick a date to say that you are either on the Social Security program or you are off it?

Mr. TOMPKINS. Unless you are going to decide that you want to look at how our system—how a system in Puerto Rico would be established during that three-year period, and then what we could work with that system, and what we want to do. Which would mean that there would still be a cut-off period, but we would negotiate with the Government of Puerto Rico at that time as to what we would put into the system.

The CHAIRMAN. Well, it goes without saying that under any of these three options, that what we do here is not the absolute final word. Because if we put it in place and it did not work—I mean, if it is an independent Puerto Rico and the people are hurting or something, I think, at least speaking again for myself, we would help.

Mr. TOMPKINS. Yes.

The CHAIRMAN. And contrarywise, under statehood, if we phase-out something and the island goes into catastrophe, we might say well, we tried to be evenhanded, but it did not work. And I think we have done that with commonwealth. I mean, we have created in Puerto Rico the most viable economy in all of the Caribbean.

But even that is not final. We are trying to enhance it as we sit here today. But still in all, that said, we want to put in place a predictable system on which the new independent Republic of Puerto Rico could count. It would rise, we hope, we have not settled this legal question, but we hope that that rises to the dignity of a treaty.

When the people of Puerto Rico vote, if they voted for independence, that this would give them and the United States mutual, bilateral rights upon which they could count, subject, of course, that both could change their minds and modify it later by mutual consent. But we want to give the people of Puerto Rico something they can count on. And for that reason, on Social Security, it seems to me, and I would like for you to look at the machinery whereby we keep the whole system in place for X years—I am thinking three years—and then a cut-off and a granting of an amount of money payable, with interest, over a period of years, so they can set up their own system.

And I would like for you to look at that.

Now, turning to Medicare and Medicaid, how do you phase out and phase in Medicare and Medicaid under independence?

Mr. TOMPKINS. Under the independence, on the Medicare, there would be a big issue as to how—once again, it would be similar to the issue of Social Security. What do we pay those beneficiaries or pay into a system that Puerto Rico, we think, would put in place that would cover Medicare patients?

The CHAIRMAN. Now, what I also have in mind there is that we do the same thing on Medicare. But, of course, there is a greater difficulty, because payments to providers and to doctors, and all of those things, anticipate that there be a system in place in Puerto Rico of employees, and all of that. And I think the independence group would want that. I am certain they do. Because they recognize we have got to have a period of time to adjust.

So I want you to be thinking about, or maybe you can give us an answer now, as to whether there are any difficulties in Medicare or Medicaid, assuming the willingness and desire of the new Republic of Puerto Rico to have those people in place, whether there are any mechanical problems with that.

Mr. TOMPKINS. I think, on the Medicaid, it would not be much of a problem except that it would be put into a block grant of some sort, that we talked about, as mentioned in the bill itself.

The CHAIRMAN. Right away, or would not we need——

Mr. TOMPKINS. It could be phased in. I think that is negotiable, what you want to put in there. I think we would probably want to phase it in, yes.

The CHAIRMAN. No, I am talking about on Medicare. Could we keep the whole system in place for a period of time, to be determined?

Mr. TOMPKINS. Yes. Certainly, we could.

The CHAIRMAN. And Medicaid and all of those things?

Mr. TOMPKINS. Yes, Medicaid you could as well. I mean, Medicaid is more of a payment to Puerto Rico than it is to assist them. In other words, Medicare, you are looking at a beneficiary-type system, and we pay to providers based on beneficiary expenditure dollars. But on Medicaid, it is more of a grant to Puerto Rico. I guess it was about $78 million, somewhere in that range, right now.

The CHAIRMAN. What we would want on those programs is your advice on the cost during a three-year period, and then the block grant cost, and any provisions that you would see in a phase out. What I foresee in independence is a period where you keep everything in place and then you begin to phase it out.

Now, where it is a block grant, as under Medicaid, you just have an ever-declining amount that is easy to figure.

On Medicare, I guess it would be a block grant. And we have to figure out what that amount of the block grant is. And then, going down, so——

Mr. TOMPKINS. I think we would be concerned about how that was done, basically, on looking, as well as money, is the quality assurances of what we are paying for that are under the Medicare system right now.

The CHAIRMAN. Well, under independence, the idea is that this is a new independent country, and we will negotiate and we will offer whatever service we are asked to do. But, I mean, that would be the idea if the people of Puerto Rico chose independence, then it is their new responsibility. We are friendly, but it is their responsibility, and that is why we would want to just design it so they could count on a certain number of dollars.

And help us think of those mechanical problems, whether or not we could just phase that out.

Mr. TOMPKINS. I think you certainly could in Medicaid, and I am sure we just have to look at what we are paying now on the Medicare.

The CHAIRMAN. And food stamps, as well, are not a problem because it is a block grant.

Mr. TOMPKINS. Yes. And I think Medicare is no problem either. We would just have to look at the numbers and how that would be actually phased out.

Senator MCCLURE. Mr. Chairman, may I ask a question with respect to Medicare?

The CHAIRMAN. Sure.

Senator MCCLURE. What is the current situation with respect to U.S. citizens who live abroad?

Mr. TOMPKINS. On the Medicare?

Senator MCCLURE. Yes.

Mr. TOMPKINS. We do not provide services to any citizens in another country, or others in the Medicare program. You would have to be in the United States or within a territory of the United States.

Senator **McClure**. Is that true of U.S. citizens who are traveling abroad?

Mr. **Tompkins**. Except in Canada and Mexico. We do provide emergency services for Medicare beneficiaries in those areas.

Senator **McClure**. You do in Canada and Mexico?

Mr. **Tompkins**. Emergency services we would provide.

Senator **McClure**. How about a U.S. citizen in the newly independent Republic of Puerto Rico?

Mr. **Tompkins**. Under the way we currently do Medicare in foreign countries, no, we would not.

Senator **McClure**. Unless we treat them as we do in Mexico and Canada, and that would be on an emergency service basis?

Mr. **Tompkins**. That we be more or less those people traveling in those countries——

Senator **McClure**. That would be those who are domiciled in the United States. What about a U.S. citizen who has lived in Mexico for 30 years? Do we provide emergency services to that U.S. citizen today?

Mr. **Tompkins**. No. My understanding of what we do, it is emergency services to help them obtain some help to get them back in the United States. So if someone is domiciled in Mexico, we do not.

Senator **McClure**. How about a U.S. citizen living in Mexico for the last 30 years who returns to the United States for medical treatment?

Mr. **Tompkins**. If they are a Medicare beneficiary, they could. If they are eligible under the program they could.

Senator **McClure**. They are eligible, they are U.S. citizens, they come to the United States. So we might, in that event, find a case here if we treat Puerto Ricans as other U.S. citizens living abroad? If they are U.S. citizens they could come to Miami for their medical treatment?

Mr. **Tompkins**. Yes. I would imagine they could, yes.

Senator **McClure**. Hot dog.

Mr. **Tompkins**. If they are eligible beneficiaries under the program.

Senator **McClure**. I guess I will get myself a little piece of an airline. [Laughter.]

If I understand you correctly, it is your position and your belief that it is correct that those who already vest under Social Security cannot be divested of that right?

Mr. **Tompkins**. Presently, yes. It would depend, if you want to talk in terms of future, what S. 712 does—you could divest them under independent theory of the bill, but——

Senator **McClure**. If a United States citizen has worked 40 quarters under covered employment, and is therefore covered, and he has vested rights under Social Security, and he leaves the United States, he maintains his Social Security coverage today, does he not?

Mr. **Tompkins**. That is correct.

Senator **McClure**. And could we, from a constitutional standpoint, say, "You leave the United States, you leave your benefits behind?" Or is that something the courts are going to protect as a vested right?

Mr. TOMPKINS. I think that would be an extremely good court case. I do not think the Constitution—I think Congress could pass a law to divest people of that right.

Senator MCCLURE. Do you believe that the Congress could pass a law that said in order to keep your Social Security benefit, you must continue to reside in the United States?

Mr. TOMPKINS. I am not speaking as an expert on this, so I am not sure about that. That is something for the Justice Department and other attorneys would have to think about, but I would think that that could be; I am not sure. I do not know whether——

Senator MCCLURE. Do you have, within HHS, an expert who could answer that, or are you going to punt that ball over to Justice?

Mr. TOMPKINS. I will ask our General Counsel's office.

Senator MCCLURE. Would you do that please and provide that answer for the record?

Senator MCCLURE. Would you include in that question, perhaps, an alternative question as to whether or not it makes a difference whether that is a non-discriminatory provision with respect to all U.S. citizens in a similar situation?

Mr. TOMPKINS. Okay.

Senator MCCLURE. I do not know what our options are in that regard, but it strikes me that indeed it is likely that the answer will be those rights are vested. If those rights are vested, we may have to treat the phase-in provision, with respect to the vesting of Social Security, in a different manner than we would the transition phase of other Federal programs. Because it has a much different consequence, with respect to the future.

And to be very precise about it, in the event of independence, we might elect to prevent the vesting of rights in those who do not have vested rights at the date of independence, rather than over a longer period of transition. If you could get the answer to that and attempt to give us a recommendation with respect to how we should treat that question.

Mr. TOMPKINS. I would be glad to, Senator.

The CHAIRMAN. On page 10 of your statement, you suggest that if hospital reimbursement rates were applied to Puerto Rico, it would increase the cost to Medicare by 36 percent. If Puerto Rico were to become a state, would retention of the current payment system to hospitals, for a period of time at least, present any constitutional problem that you can see?

Mr. TOMPKINS. Not that I can see. If we are saying that the transition period itself would be legal, I would imagine this would be legal as well.

The CHAIRMAN. Actually, I think that is exactly right. And we have got to have the transition power, otherwise this thing just does not work. I mean, otherwise, this statehood power means very little. It has got to be that way. But we would like some advice on that as to, again, keeping the rate the same, and any mechanics of phase-in or phase-out.

Let me state again for the purpose of emphasis, at least what I would hope to do is—a period without any change, and then phase-in and phase-out of the various programs so that the net effect would be the same as the status quo. The level playing field is determined by the status quo and changes to that—you bring in taxes, which are cost, at the same time you phase in programs, which are an expense, so that the two even out as far as possible.

Now, let me ask—turning to Mr. Rosenbaum, on coffee. Coffee is a small matter in terms of cost—about $11 million as I understand it. But many of us are great lovers of Puerto Rican coffee and do not want to see that changed under statehood or under anything.

If Puerto Rico has the power under GATT now to impose that tariff—we assume they do, because they do it—would they not also have that power under statehood?

Mr. ROSENBAUM. Yes, Mr. Chairman, I have stated that for the record. We think they would. I might point out, however, under statehood, the anomaly that would occur, as you are probably aware, there is some coffee produced in the State of Hawaii, and there are plans to increase the production of coffee on the Island of Molokai.

And I do not know how the citizens of Hawaii would feel about not being able to maintain a tariff, but the State of Puerto Rico would. There would be no justification under the GATT for our also having a tariff for the State of Hawaii.

And of course there is the issue of equity. Do we want states maintaining tariffs among each other? And I will leave the answer to you. We could, of course, and we would be willing to maintain the tariff for the State of Puerto Rico.

Senator McCLURE. Did I understand you to say you would against the State of Hawaii?

Mr. ROSENBAUM. No, I said, for the State of Puerto Rico, we would continue the duty that they currently enjoy. It would be impossible to provide the same duty for the State of Hawaii.

Senator McCLURE. But would, if coffee were imported from Hawaii to Puerto Rico, would it be subject to a tariff?

Mr. ROSENBAUM. It is now.

Senator McCLURE. It is now, but would it be possible to do so under statehood?

Mr. ROSENBAUM. Yes. That is, providing you legislate it to be the case.

Senator McCLURE. That is not a violation of the Commerce Clause?

The CHAIRMAN. The Commerce Clause says Congress shall regulate commerce between the several states.

Senator McCLURE. And so we could provide for a tariff between states?

Mr. ROSENBAUM. You can. As I said, it is rather an anomalous situation.

To use your phrase, before the level playing field among states could be disrupted.

The CHAIRMAN. I have got some more questions, but while I am looking, Senator McClure, do you have any more?

Senator McCLURE. Thank you very much, Mr. Chairman. Let me be very brief. Many of the problems you highlight with section 5.3(b) appear essentially to be drafting matters, if I understand the intent of this section correctly.

One potential problem could be eliminated, as you suggest, by limiting favorable treatment of goods to products of Puerto Rico.

Are there other suggestions you could give us to try to restrict this treatment to current practices?

Mr. ROSENBAUM. I have made suggestions in my testimony. I do not know if I have any other comments at this point.

Senator McCLURE. That is in the event of independence?

Mr. ROSENBAUM. Yes. There are some other comments that I could make. Perhaps the Congress would want to make the new, independent country eligible for benefits under the generalized system of preferences which we maintain for developing countries and in addition, eligible for the benefits under the Caribbean Basin Initiative which are enjoyed by 22 countries in the Caribbean Basin area as well.

A third option would be to explore with Puerto Rico its interest in negotiating a bilateral free trade agreement. Now, currently during the Uruguay Round most multilateral trade negotiations, the Administration is not entertaining negotiations of bilateral free trade agreements.

Depending on how these multilateral negotiations conclude, we would have to make a judgment about whether to entertain additional bilateral free trade agreements or not, so I am not in a position to say at this point whether or not we would look favorably or unfavorably on negotiating such an agreement with the new Republic of Puerto Rico, but that is certainly an option. How viable it is, I cannot really comment at this point.

Senator McCLURE. You would not suggest that we include that in legislation at this time as a conditional grant in the event of independence?

Mr. ROSENBAUM. The current Omnibus Trade and Competitiveness Act of 1988 authorizes the President to enter into these bilateral free trade agreements with any foreign government or any foreign country if the agreement contributes to the overall trade liberalization objectives that we have, and so we already have authority to do that.

Senator McCLURE. Would the Administration support an expression by Congress that the President should attempt to negotiate a mutual free trade arrangement similar to that with Canada during the transition period prior to independence?

Mr. ROSENBAUM. Senator, we have not made any policy judgments about that. If you would like, I could try to obtain one for you, but in our view at the present time, these additional agreements are premature.

Senator McCLURE. On page 5, you suggest that the President seeks preferential tariff treatment for Puerto Rico from other countries. Would the Administration support an expression by Congress that the President should seek preferential tariff treatment for Puerto Rico in the event of independence?

Mr. ROSENBAUM. Yes, we would be willing to entertain that.

Senator McCLURE. You would?

Mr. ROSENBAUM. Yes.

Senator McCLURE. Now, if I could turn for a moment back to the questions that were posed to you, Mr. Tompkins, on Medicare/Medicaid, Social Security becomes a vested right after the employment and covered employment for 40 quarters. Medicare/Medicaid are not vested rights in the same sense, are they?

Mr. TOMPKINS. No, they are not. Medicare, Part A is. Medicaid is not.

Senator MCCLURE. Medicare Part A is a vested right? It follows citizenship wherever you are?

Mr. TOMPKINS. Well, the point that it would follow you but you would not obtain any services in another country. But the United States, we would not pay for an operation or what have you in another country. But you still have that right.

Senator MCCLURE. You have the right. You just cannot get paid?

Mr. TOMPKINS. Yes. You can come back to the United States and get paid.

Senator MCCLURE. It is a right which is vested if you are here in the United States?

Mr. TOMPKINS. Yes, it is. If you work the 10 years under Social Security and you gain eligibility under that, then your Medicare eligibility is vested.

Senator MCCLURE. But it vests only if you receive the services here in the United States?

Mr. TOMPKINS. Except for the exceptions I mentioned in Canada and Mexico.

Senator MCCLURE. I am a little puzzled to know exactly how you do that on a nondiscriminatory basis. What if you go to Great Britain? You are not entitled to emergency services in Great Britain, but you are in Canada or Mexico?

Mr. TOMPKINS. That is my understanding of the way the program works at this time, yes sir.

Senator MCCLURE. I am still a little perplexed to know how you get around the nondiscrimination provisions.

Mr. TOMPKINS. It is only in border hospitals. It is only protection for hospitals on the border.

Senator MCCLURE. Congress may have enacted it, but many times we enact things with which the courts do not agree. That is just the way it is, so that is the way it is?

Mr. TOMPKINS. Right.

Senator MCCLURE. I understand that, but the reason that I focus on that again, it seems to me that we may have to deal differently between the rights which vest, that follow regardless of where you are domiciled and those that depend upon domicile as well as citizenship, and apparently that is what we are getting to here, that while it is a vested right, your ability to use that right depends upon where you are domiciled, or at least, where you receive benefits?

Mr. TOMPKINS. Under Medicare, that is correct. Under Social Security, that is not.

Senator MCCLURE. You get slightly different results with respect to other entitlements. That issue was addressed in *Harris* v. *Rosario*. I am not sure that I know what it would mean with respect to our ability to deal with those questions in the event of independence, and I would like to have your advice with respect to the entitlements questions raised in *Harris* v. *Rosario*, in the event of the grant of independence.

I proceed under the assumption that, in the event of independence, we could deal with that in a transition phase, but we could terminate them.

Mr. TOMPKINS. That is my understanding under that court case, particularly as to the vested rights in Social Security.

Senator MCCLURE. Even though they may retain U.S. citizenship?

Mr. TOMPKINS. That is my understanding, but I have to—like I said before I will get back to you exactly on that.

Senator MCCLURE. All right. Thank you very much, if you would. On page 11, you note that under independence you are concerned about the disposition of loans to individuals and loans to entities.

Mr. TOMPKINS. Yes, sir.

Senator MCCLURE. What options do you propose to resolve those matters?

Mr. TOMPKINS. Well, you really have three options. You could continue the loan programs to the individuals and to the entities, or you could, two, sell them off to Puerto Rico, or three, you could just give them away to them and forgive them the payment of them.

I think we look at, in terms of if it is—in particular I mentioned health professions education. I think we would still want to require those doctors and nurses that receive those loan funds to return payment. But how you would loans to hospitals for construction, which is more of a capital cost, we may want to think of some type of a purchase agreement on that.

The CHAIRMAN. If the senator would yield at that point, it seems to me that those loans, we ought to put a value on those loans and transfer them to Puerto Rico and have them count against this base line out there, because it surely would not work to have the United States suing some poor student who could not pay their student loan in a Puerto Rican court.

I mean, that is not the kind of relationship you want to get started between two countries. So if you could look at it from that standpoint and give us a mechanism for valuing—in fact, put a value on them and give us some mechanism, that would be helpful.

Mr. TOMPKINS. We will do the best we can. It will be difficult, but we will do the best we can, particularly on the student loans. The health profession loans and all may be difficult, but we will try to do that.

The CHAIRMAN. I understand a lot of these things are going to be very tough to estimate, but we just sort of have to do the best we can and say, this is what we estimate and here is revenue neutrality. It may not be exact. Excuse me.

Senator MCCLURE. On page 10 again, you made reference to the reimbursement to hospitals. The Chairman has already asked you some questions about it, but I want to make sure that I understand what it is you are saying. You say, if the hospital reimbursement rate in Puerto Rico were paid as it is now in the states, there would be a 36 percent increase in the payments to the hospitals. Is that correct?

Mr. TOMPKINS. Yes, sir.

Senator MCCLURE. You say that hospital costs are substantially lower in Puerto Rico?

Mr. TOMPKINS. That is correct.

Senator MCCLURE. Is the level of medical care in the hospitals in Puerto Rico equivalent to the level of medical care in the states? In other words, does the lower cost reveal a lower level of care, or is it simply a cost differential?

Mr. TOMPKINS. I think it is a cost differential. There may be some issues as to quality of care in Puerto Rico that I am not aware of, but I think our primary concern here was more of a cost difference, what it costs to do different services and procedures in hospitals that are different from the United States. So that would not necessarily go to the issue of quality.

Senator MCCLURE. Could you look to see if you have the information available to you with respect to levels of care? Are there as many dialysis availabilities in the hospitals? Are there as many CAT scans? Are there as many of the other kinds of technical services available? Is the level of care in the hospitals in Puerto Rico as high as it is in the states? And if it is not, can you quantify it in terms of a difference in dollars?

Mr. TOMPKINS. I will attempt to do that, sir.

Senator MCCLURE. I understand that may be difficult, and I ask it with some hesitancy because I know that, but I do not want us just to assume that the levels of care are the same and that we should not increase payment, because otherwise we would be in effect overpaying the Puerto Rican hospitals.

Mr. TOMPKINS. My point was merely to the point of equity, as we talked about equity amongst all the hospitals in the country and this would be, in essence, if we did this in any other state it would be considered an overpayment to that state.

Senator MCCLURE. I will not get into that right now—the difference between urban and rural hospital reimbursements—but you are about to bankrupt the hospitals in my state under that theory.

Mr. TOMPKINS. That is a whole other issue.

Senator MCCLURE. I will have to have an airline from Boise—no, Boise is not the right area. They have urban hospitals. I will have to have an airline from the rural communities in Idaho to the urban communities in Idaho to move people there for care, just as we are talking about moving people from Puerto Rico to Florida to get a Medicare and Medicaid in the event of independence. It is a very real problem, but that is a separate problem. I want to look at this question with respect to Puerto Rico in a little more detail.

Mr. Chairman, I have a number of other questions which I will submit for response in writing.

The CHAIRMAN. By the way, on the question of independence and, let us say Medicare, if we go to the concept of dual citizenship, after independence, of citizens who are now citizens—in other words, they do not have to elect; they keep their citizenship—is there any problem in denying those citizens of Puerto Rico still resident of Puerto Rico who are also United States citizens, denying them Medicare coverage?

Mr. TOMPKINS. Back in the United States, for instance?

The CHAIRMAN. In either. Well, let us say in the United States.

Mr. TOMPKINS. In the United States I would imagine, as in Social Security, if my information is correct on that, I think we could do that, depending on the whole vested issue that Senator McClure was just referring to. If they paid in, I would imagine, in Social Security they come to get payments, it would be the same issue.

The CHAIRMAN. Well, on Medicare they would not be—presumably they would not be paying into Medicare after the three-year period.

Mr. TOMPKINS. So I would imagine if we divest them of their right at that point, if we say after the third year you are no longer vested in the Social Security system, then the same would hold for Medicare. I would posture that.

The CHAIRMAN. Well, Social Security is easier, because we just say, your rights are cut off on Social Security and you are no longer a member of the system. I presume we could do that.

Mr. TOMPKINS. They are interchangeable as far as eligibility is concerned and so I would venture to say everyone who was not vested any longer in the Social Security system would also be not vested in the Medicare as well.

The CHAIRMAN. How about—are there any other programs as to which this would present a problem? We are talking dual citizenship. The initial three-year period is ended and the people who are actually residing in Puerto Rico, could they be denied AFDC, et cetera, et cetera—I mean, after a phase-out period?

Mr. TOMPKINS. Certainly AFDC is a federally-financed program amongst the states and it certainly could be cut off. I do not think there would be any issue at all there. There would not be one of foster care. I do not think there would be an issue of Social Service. Block grant, any of those number of programs that we provide to Puerto Rico as well as to the other states would be included in that, and so I do not see an issue at all in that.

The CHAIRMAN. Mr. Rosenbaum, on trade you state that under Commonwealth, the draft asked for—I think it is participation, if I recall the right word—and you were against that and I can understand that, but how can we give—how can we maximize consultation?

I mean, we do not, under a continued enhanced Commonwealth situation with Puerto Rico—to give them the right to go in and separately negotiate trade agreements, that might not be acceptable.

How can we maximize a consultation? A participation in the sense, not of voting but of being part of the—actively being consulted about things which directly involve them?

Mr. ROSENBAUM. Well, I think the point I have made is that to have representatives of the Commonwealth on our trade negotiating delegations would be burdensome. If we were, for example, to have all 50 states represented on the delegations, why we would have mammoth delegations.

On the other hand, we do have already a very complex consultative mechanism with the private sector. For example, we have legislatively required consultative groups that give us advice in the private sector in the agricultural community and the labor community, the industrial community here in the United States, and we also have consultative mechanisms with the governors.

I have, when I have been to Puerto Rico, talked to authorities there and mentioned to them, for example, that in the Uruguay Round trade negotiations which are going on, they should be sure to let us know what Puerto Rico's interests are so that we can attend to them just as we do for the various industries in the agricultural community and so forth.

The CHAIRMAN. Well, could you help us design legislative provisions which would provide for that consultative process? You may indeed oppose those provisions, but if you will help us draft the legislation so if we should choose to do that, we will do it right according to the way you do it and then we would also like your advice as to whether you would then oppose those in the Commonwealth option.

Mr. ROSENBAUM. We would be delighted.

The CHAIRMAN. In other words, we want to allow maximum participation of Puerto Rico consistent with the Commonwealth status. Now, Senator Domenici, who has participated actively in these hearings earlier, I am glad to welcome him back. If he has any questions——

Senator DOMENICI. Thank you, Mr. Chairman. Mr. Chairman and witnesses, if this has been asked, please do not take any time with it but it does seem to me that we have had a constitutionally satisfactory capability to offer a different kind of service with reference to things like—a different kind of payment and program in areas such as SSI and others with reference to American citizens who reside in Puerto Rico.

We may even be thinking about a different treatment for Social Security in terms of the vesting and the entitlement. But I wonder if anyone has thought of the constitutional provision of equal protection and once the island—let us assume they chose statehood.

Is it not probable that the courts would say, equal protection demands that there be no different treatment between an American citizen living in a state now called Puerto Rico than an American citizen living in Idaho, Louisiana or New Mexico?

Mr. TOMPKINS. I think that could very well be an issue, but there are issues that have come up with other territories that have become states in which there was a transitioning in of those rights and what have you, in those areas.

I am not totally familiar with that, but it seems to me that—and how you do this in an equitable way both to the United States as well as to the State of Puerto Rico at that time would be an issue.

Some of the issues we have would be the impact it would have on Puerto Rico itself, whether Puerto Rico citizens would have some problem with the way we would do that. An infusion of a a great many dollars in, for instance, into the SSI program, would cause a lot of havoc, I would think, into their social and economic institutions there.

Maybe a phase-in period as the economy pumps up would be a more equitable way to go about it. So I think there are issues in that, but there could certainly be some constitutional question as to how, exactly, that was done.

Senator DOMENICI. I understand it a little more clearly on SSI than I might on social security. Let us assume somebody qualifies for social security but has not yet vested; that is, they have worked enough but they have not reached the next qualifying level, which might be age, it might be an infirmity which disables, both of which would vest. Has it been discussed that conceivably we would treat an American citizen in Puerto Rico differently with reference to that period or to that situation?

Mr. TOMPKINS. During the transition period?

Senator DOMENICI. Would they not be entitled to the vesting when it occurred, just like an American living in any other state?

Mr. TOMPKINS. I think so, Senator. Yes, sir.

VOICE. There are no problems with respect to social security or Medicare.

Senator DOMENICI. Mr. Chairman, I know we have the trade representative here, and I guess I do not quite understand the witnesses we had this morning from Treasury versus this witness. And so just help me along, if you will.

Mr. Chairman, do I understand one of the issues discussed this morning was section 936, the incentive tax program that currently exists, and that is not within the purview of this witness, who is the trade representative?

The CHAIRMAN. That is correct.

Senator DOMENICI. And do I understand the Treasury Department had no real comment with reference to what they thought about that kind of thing?

The CHAIRMAN. Well, they gave us some interesting, particularly historical information, but they said, in effect, that we ought to go ahead and legislate, and the people of Puerto Rico ought to vote before they know what the treatment under 936 will be; and then in some indefinite time in the future, they will negotiate that matter out. And so we said, very politely, we thought that was unacceptable. [Laughter.]

Senator DOMENICI. I would think that would be the case. I think that would not even be a fair election unless they had some indication of what is going to happen with that and a few other things. That probably is among the most significant.

I have no further questions. I thank you for the time, Mr. Chairman.

The CHAIRMAN. Would you all have any advice on 936? [Laughter.]

Mr. TOMPKINS. No, sir.

The CHAIRMAN. Actually, Mr. Rosenbaum, would different treatment on 936 give any problems that you would care to speak about on the Caribbean Basin or other tax agreements or whatever?

Mr. ROSENBAUM. It certainly would have an effect on the current program the Commonwealth maintains with the Caribbean Basin Initiative countries; that is, those countries that have signed tax information agreement exchanges, exchange agreements where they are able to obtain some of this below-market financing. That is, if you were to phase out or eliminate 936. Other than that, I would not care to comment.

The CHAIRMAN. Well, can you give us advice on that? I mean, does it in a statehood situation, if 936 is phased out over a period of time, what would be the effect? Does it violate any of our international agreements? And if so, should we try to put something else in place of it, and if so, what? If you will give us some written advice on that.

Mr. ROSENBAUM. I think in collaboration with my colleagues at Treasury, one of us will get back to you, sir.

[The information requested was not received.]

The CHAIRMAN. Thank you very much.

We are going into markup in about two weeks, so we need quick turnaround really. The size of the problem you have to grapple with is a great one. Ours is even bigger than yours, because we have to deal with both your information and others.

But again, to the extent that you can give us this advice on these technical programs, it would—mean, it is essential that we get it and an estimate on the cost of each of the programs.

Thank you very much, gentlemen.

Mr. ROSENBAUM. Thank you, Mr. Chairman.

Mr. TOMPKINS. Thank you, Mr. Chairman.

The CHAIRMAN. Next we would like to have as a panel the next three witnesses: Jeffrey N. Shane, Assistant Secretary for Policy and International Affairs, Department of Transportation; Mr. James W. Brennan, Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration of the Department of Commerce; and the Honorable Alan C. Raul, General Counsel of the Department of Agriculture.

Gentlemen, welcome to the committee. And I suppose we should commence with—let us commence with Mr. Raul.

STATEMENT OF ALAN C. RAUL, GENERAL COUNSEL, DEPARTMENT OF AGRICULTURE

Mr. RAUL. Mr. Chairman, distinguished members of the committee, it is my privilege to appear today on behalf of the United States Department of Agriculture to discuss S. 712, the bill to provide for the referendum on the political status of Puerto Rico.

With the Chair's permission, I would like to submit my complete statement for the record and present a brief summary this afternoon.

We strongly support the right of the people of Puerto Rico to choose for themselves their political status, whether it be permanent union with the United States, closer association as an enhanced commonwealth, or friendly neighbor as an independent nation. We have concluded a preliminary analysis of how the bill would affect the programs administered by the Department of Agriculture, and I shall briefly address what we believe to be the principal issues.

Major USDA programs in Puerto Rico include the following: food assistance to Puerto Rican people of limited means, including the $908 million Nutrition Assistance Program for Puerto Rico; $133 million in Child Nutrition Program; and $79 million in the Special Supplemental Feeding Program for Women, Infants and Children; support for small community and rural development through the Farmers Home Administration loans and grants. Farmers Home Administration obligations in Puerto Rico in fiscal year 1989 are estimated at $126 million. Tropical forestry research and management of the 28,000 acre Caribbean National Forest, the only tropical rain forest in the national forest system—in fiscal year 1989 the USDA will spend about $1.5 million on tropical forestry research and another $1.8 million to manage the forest.

And if I may, Mr. Chairman, I would like to ask to include in the record a copy of this Forest Service brochure entitled "Global Neighbors Growing Together: A Tropical Forestry Program." [1]

We also have a tropical agricultural research and education program, including operation of a 190 acre agricultural research station at Mayaguez. Estimated obligations for 1989 are about $13 million. Marketing and inspection programs to protect consumers and plant and animal resources are estimated at about $12 million.

Under the statehood option, if I may address that first, with the significant exceptions noted below, we believe that a choice by the Puerto Rican people of the statehood option would have no serious impact on USDA programs. Each year, in lieu of participation in the food stamp program, Puerto Rico receives a block grant known as the Nutrition Assistance Program.

We estimate that in fiscal year 1992, the NAP block grant, as it is presently structured, will cost about $892 million. If the people of Puerto Rico opt for statehood, we estimate that this would increase the cost of the NAP or food stamp program to a total of $1.2 billion. However, this increase may be moderated to some extent because of changes made by S. 712 to the Department of Health and Human Service programs in Puerto Rico.

Section 5(b) of the bill leaves unclear the ownership of the Agricultural Research Service research station. We would intend to supply clarifying amendment to make clear that the station is to remain in the hands of ARS.

Section 5(c) of the bill would require each federal agency to report the need for any land or property held by the United States in Puerto Rico. The President could convey to Puerto Rico any property he determines is no longer needed.

USDA strongly opposes the transfer to Puerto Rico of the Caribbean National Forest, the research station at Mayaguez, or the $1.5 billion loan portfolios of the Farmers Home Administration and Rural Electrification Administration. We would intend to provide amendments to exempt USDA's property interest from coverage under section 5(c) or, in the alternative, to provide for compensation by Puerto Rico or for public sale of assets held by Farmers Home or REA.

Under the independence options, the United States benefits would be phased out over a 20-year period under this option. USDA domestic food assistance programs would be converted into block grants, continued for 10 years at an aggregate level of $1.1 billion. They would be phased out over the following decade, reaching zero in the 20th year.

The CHAIRMAN. Mr. Raul, let me interrupt you at that point to say that we have read your testimony, and again, we want time for questions. And so if we may now move on to Mr. Shane.

[The prepared statement of Mr. Raul follows:]

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[1] Retained in committee files.

Statement of

ALAN CHARLES RAUL
General Counsel
United States Department of Agriculture

before the

Committee on Energy and Natural Resources
United States Senate

July 13, 1989

Introduction

Mr. Chairman, distinguished Members of the Committee, it is my privilege to appear today on behalf of the United States Department of Agriculture to discuss S. 712, A Bill "To provide for a referendum on the political status of Puerto Rico."

We strongly support the right of the people of Puerto Rico to choose for themselves their political status, whether it be permanent union with the United States, closer association as an enhanced commonwealth, or friendly neighbor as an independent nation. It is a precious moment in history when a free people can choose the course of their own future by referendum. I am therefore proud to participate in discussions leading up to this event.

We have concluded a preliminary analysis of how the bill would affect the programs administered by the Department of Agriculture (USDA), and I shall briefly address what we believe to be the principal issues.

Although the timetables for implementation under the bill are different for each of the options for Puerto Rico, for the purpose of our preliminary analysis we have used the President's fiscal year 1990 budget estimates as the base and we have assumed that the budget impact for each option would be experienced in full in fiscal year 1992.

Overview

I would like to begin with a brief overview of USDA's operations in Puerto Rico. USDA support and cooperation in the development of Puerto Rico has been continuous throughout this century. Many of the programs operated by USDA on the mainland are operated in Puerto Rico. These include programs to ensure that meat and poultry products are wholesome, unadulterated, and properly labeled and packaged; programs to protect the animal and plant resources of Puerto Rico and the mainland from destructive pests and diseases; conservation programs; farm lending programs; rural development grant and loan programs; housing assistance programs; the provision of crop insurance; and food assistance for people of limited means. For fiscal year 1989, we estimate that USDA has about $1.3 billion in obligations in Puerto Rico. Major USDA programs in Puerto Rico are the following:

-- Food assistance to Puerto Rican people of limited means through programs operated by the Food and Nutrition Service (FNS), including the $908 million Nutrition Assistance Program for Puerto Rico (NAP), $133 million Child Nutrition Program, and $79 million Special Supplemental Feeding Program for Women, Infants and Children (WIC).

-- Support for small community and rural development through the loan and grant activity of the Farmers Home Administration (FmHA). FmHA activity in Puerto Rico includes making and guaranteeing loans for farm ownership and operation, making loans for rural home ownership and rental housing (plus rental assistance for low income tenants), loans and grants for community water and waste disposal systems, loans for essential community facilities, and guarantees of loans made by private lenders for business and industry. In most cases, FmHA serves as lender of last resort, providing assistance to individuals, municipalities and organizations unable to obtain credit elsewhere at reasonable rates and terms. FmHA obligations in Puerto Rico in fiscal year 1989 are estimated at $126 million.

-- Forestry research and support, including management of the 28,000 acre Caribbean National Forest, one of the oldest forest reserves in the Western Hemisphere. A large part of the area was originally set aside by the Spanish Crown in 1876. The Caribbean National Forest was formally established by proclamation of President Theodore Roosevelt in 1903. It is the only tropical rain forest in the National Forest System. It is managed by the Forest Service for the people of Puerto Rico and the United States. USDA will spend about $1.5 million on tropical forestry research, and another $1.8 million to manage the Forest. The Caribbean National Forest provides protection for a broad range of natural resources including watersheds that serve surrounding communities. It also serves as a valuable wildlife habitat. Half of the forest's 28,000 acres remains undisturbed.

-- Support for tropical agricultural research and education, including operation of a 190 acre agricultural research station at Mayaguez since 1936. Estimated obligations for 1989 are about $13 million.

-- Marketing and inspection programs to protect consumers, and plant and animal resources, about $12 million.

We have completed a preliminary program by program review of how the three political options envisioned by S. 712 would affect USDA programs. We intend to provide the Committee with a detailed legislative report outlining the impact of S. 712 on affected USDA programs, and offering suggested amendments to address what we believe to be problems with the legislation.

Statehood

With the significant exceptions noted below, we believe that a choice by the Puerto Rican people of the statehood option would have no serious impact on USDA programs or expenditures. Most USDA programs are operated in Puerto Rico exactly the same way as they are in the States. Thus, the statehood option would have no effect on outlays for marketing and inspection programs, agricultural research and extension programs, and support for child nutrition and WIC.

Each year, Puerto Rico receives a block grant, known as the Nutrition Assistance Program (NAP). Puerto Rico receives this grant in lieu of participation in the Food Stamp Program, which is available in all fifty states, the District of Columbia, Guam, and the Virgin Islands. The practical effect of the block grant is to assure a specified level of food aid for the Island while simultaneously imposing a ceiling upon federal expenditures there.

The current capped annual block grant program, NAP, was mandated by Congress in 1981 to become effective on July 1, 1982. NAP was intended to curtail soaring Food Stamp Program costs in Puerto Rico, which in 1981 amounted to $915 million. At that time 1.8 million persons (56 percent of the Island's population) were receiving program benefits. Implementation of the NAP in 1982 resulted in declines in both participation and benefit costs to totals of 1.43 million persons and $843.6 million respectively in fiscal year 1989.

We estimate that in 1992 the NAP block grant, as it is presently structured, will cost about $892 million. If the people of Puerto Rico opt for statehood, we understand that the bill contemplates that the NAP program would be increased sufficiently to provide benefits for essentially all persons who would be eligible to participate in the Food Stamp Program as it is in effect throughout all the states. We estimate that this would increase participation to about 1.7 million persons and the cost of the NAP, or Food Stamp Program, in Puerto Rico by about one-third, up to a total of $1.2 billion. We understand that because the bill would substitute S.S.I. for the current Aid to the Aged, Blind and Disabled Program, and would make open-ended Puerto Rico's AFDC Program, Puerto Ricans participating in those programs would get additional income. Food Stamp Program cost increases could be moderated, although the extent of the effect is not known. While section 16 of the bill does contemplate enactment of additional implementing legislation, we believe that the bill would assimilate Puerto Rico to the other states after admission to the Union.

Section 5(b) of the bill reserves to the United States lands acquired by the United States in a variety of ways. But the bill leaves somewhat unclear the disposition of the Agricultural Research Service (ARS) research station. We discern no Congressional intention to divest ARS of this land. But in order to resolve any doubt, we intend to supply the Committee with a clarifying amendment to make clear that the station is to remain in the hands of ARS.

Section 5(c) of the bill would require each federal agency having control of any land or property retained by the United States to report to the President and Congress concerning the need for such land or property. The President would be empowered, without further legislation, to convey to Puerto Rico any property he determines is no longer needed.

In addition to the Caribbean National Forest and the research station at Mayaguez, the FmHA has over 42,000 loans outstanding, and an inventory of 349 rural houses and 13 farms in Puerto Rico. The REA has over $300 million in electric and telephone loans secured by pledges of revenues. While the precise reach of section 5(c) is unclear, USDA strongly opposes the transfer of the Caribbean National Forest, the research station at Mayaguez, and the loan portfolios, collateral, or security interests to Puerto Rico. Accordingly, we believe that section 5(c)'s application to any of USDA's interests in Puerto Rico would be an undesirable diminution of the assets we hold there on behalf of the federal government. We intend to provide the Committee amendments to exempt USDA's property interests from coverage under section 5(c)or, in the alternative, to provide for compensation by Puerto Rico or public sale of assets held by FmHA or REA. Without any attempt to attach a value to USDA's real property in Puerto Rico, or the Caribbean National Forest, if statehood were selected, USDA outlays would increase by about $0.3 billion, to $1.5 billion in fiscal 1992.

Independence

Because the benefits of association with the United States are phased out over a twenty year period under the independence option, near term savings under this option are quite limited. USDA domestic food assistance programs -- Nutrition Assistance, Child Nutrition, and Special Supplemental Feeding Program for Women, Infants and Children (WIC) -- would be converted into block grants and continue for ten years at the currently projected fiscal year 1991 aggregate annual level of $1.1 billion. Thereafter they would be phased out by ten percent each year, reaching zero in the twentieth year.

Under the independence option, the Caribbean National Forest would be transferred to Puerto Rico. The fate of the ARS research station is less clear; but on the assumption that evicting ARS was not intended by the bill's authors, we will provide an amendment to clarify that ARS would be entitled to remain at Mayaguez. In addition, we will also be pleased to provide to you amendments which would provide for transfer to Puerto Rico with compensation, or for public sale of, the $1.5 billion in security interests and inventory property of the FmHA and REA.

The bill would appear to require FmHA direct loans to be sold with a guarantee, which would violate administration policy to allow only nonrecourse loan sales. While FmHA and REA would presumably make no new loans after independence, there would be need to continue to service the existing portfolio for upwards of 30 years unless the bill is amended, as we suggest, to provide for the disposition of these loan portfolios with compensation.

The Food Safety and Inspection Service (FSIS) meat and poultry inspection programs and the Animal and Plant Health Inspection Service (APHIS) programs would be withdrawn at a savings of $11 million. Funding for cooperative research, extension, and SCS activities would be terminated to save an additional $15 million. Half of the $3 million annual cost of operation for the Caribbean National Forest is devoted to the Institute for Tropical Forestry.

With independence, Puerto Rico would become eligible to compete for a share in various USDA commodity sales and export promotion programs and for certain Caribbean Basin Initiative benefits. Puerto Rico would also enjoy for twenty years a honeymoon period of free access to United States markets. During this period, no quotas or trade barriers could be erected by the United States against imports from Puerto Rico. This could have a serious impact upon United States sugar and ethanol interests and even upon the dairy price support program since the bill, as currently drafted, does not require that such imports be produced in Puerto Rico.

Enhanced Commonwealth

It is difficult to assess the impact of this part of the bill upon USDA programs because it purports to render inapplicable to Puerto Rico federal statutes which are inconsistent with the policy behind the enhanced commonwealth option. The bill would also permit Puerto Rico to opt out of federal statutory and administrative restrictions which are inconsistent with the enhanced commonwealth policy. However, as in the case of statehood, the bill would increase the annual cost of the Nutrition Assistance Program from $892 million to $1.2 billion. As discussed above under the statehood option, increased Food Stamp Program costs could be moderated through increased participant income due to changes in S.S.I. and AFDC benefits. Subpart 11 of title IV would appear to permit this increase to be phased in over five years.

The Caribbean National Forest would be transferred to Puerto Rico, though the bill leaves open the possibility of Puerto Rican agreement to a continued United States presence. Again, I must emphasize that USDA strongly opposes transfer of this National Forest outside of the National Forest System. While apparently not targeted, the future of the ARS research station and the security interests and inventory property of FmHA and REA would be in doubt and we intend to provide amendments to clarify that these interests should not be transferred or otherwise extinguished, without compensation.

Grants, such as those for cooperative research and extension, could be consolidated and Puerto Rico would be free to expend the aggregate sum for any purpose(s) authorized for any of the grants included in the consolidated sum. While the scope of the various "opt-out" privileges is not clear, it is possible that Puerto Rico could opt-out, for example, of restrictions imposed under section 22 of the Agricultural Act of 1933 to protect United States price support programs.

In conclusion, unless S. 712 is amended by the Committee, each of the political status options provided in the bill for Puerto Rico has some important consequences for USDA.

Statehood would increase the annual cost of the domestic feeding programs immediately by over $300 million and cast some uncertainty over the future of USDA property interests.

Independence would freeze the cost of the domestic feeding programs at projected fiscal year 1991 levels of 1.1 billion for ten years and then phase them out over the following decade. However, the United States would lose the Caribbean National Forest and, almost certainly, $1.5 billion in FmHA and REA loan portfolios. The future of the ARS' research station at Mayaguez would be in jeopardy.

Enhanced Commonwealth would also raise the annual cost of the domestic food assistance programs by $300 million, though the bill may permit the increase to be phased in over a five year period. This option, too, would result in loss of the Caribbean National Forest and, most importantly, the tropical forestry research carried on there. FmHA and REA loan assets of $1.5 billion would likely be sacrificed and United States trade policy could be seriously affected.

Mr. Chairman, that completes my prepared remarks. I would be pleased to respond to any questions.

STATEMENT OF JEFFREY N. SHANE, ASSISTANT SECRETARY FOR POLICY AND INTERNATIONAL AFFAIRS, DEPARTMENT OF TRANSPORTATION

Mr. **Shane**. Thank you, Mr. Chairman, and thank you, other members of the committee.

My name is Jeff Shane. I am Assistant Secretary of Transportation for Policy and International Affairs.

The Department of Transportation, like other agencies of the government, completely supports the importance of determination by the people of Puerto Rico of their political status; and I do not have to spend very much time explaining to the committee what a privilege it is to work with you in facilitating that determination.

Mr. Chairman, with your permission I would like to submit for the record a prepared statement.

[The prepared statement of Mr. Shane follows:]

TESTIMONY OF JEFFREY N. SHANE
ASSISTANT SECRETARY FOR POLICY AND INTERNATIONAL AFFAIRS
DEPARTMENT OF TRANSPORTATION

U.S. SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES
JULY 14, 1989

My name is Jeffrey N. Shane, and I am Assistant Secretary of Transportation for Policy and International Affairs. Thank you for providing an opportunity to testify on the important transportation implications of each of the three referendum options of statehood, independence, and enhanced commonwealth status that the people of Puerto Rico would vote on under the provisions of S. 712.

Let me make perfectly clear that the Department of Transportation fully supports the principle of providing the people of Puerto Rico an opportunity to express their preference on the future political status of Puerto Rico. Further, as the President has noted a number of times, he favors admission of Puerto Rico to the Union as a state, thereby assuring the people of Puerto Rico equal standing with other United States citizens. A number of specific provisions contained in the proposed legislation affect statutory responsibilities of the Department. I will discuss these today. The Department of Transportation, of course, remains willing to work with the Committee and its staff to resolve any remaining issues.

My comments today, as suggested in the Chairman's letter of June 13 to Secretary Skinner, are directed to S. 712 (star print).

STATEHOOD

The statehood option generally envisions admission of Puerto Rico to the Union on an equal basis with all other States. The Department has particular concerns with the following:

(1) Federal Property. Present Coast Guard missions would, of course, continue after statehood. It is not clear, however, whether under the provisions of Section 5(b) of title II (statehood option) in S. 712, lands held by the Coast Guard under private deed or other legal basis not specifically embodied in a statute, order, or proclamation would remain the property of the Coast Guard. We suggest a reformulation of this language to insure that all existing Federal property remains unaffected by the transition to statehood.

(2) The Continental Shelf and EEZ. Section 5(b) of title II (Statehood option) in S. 712, also provides that "the Commonwealth of Puerto Rico (the state) shall have the exclusive right to explore, exploit, lease, possess and use all seabed, natural, and mineral resources lying within the 200 mile economic zone continental shelf boundary around the waters of the Archipelago of

Puerto Rico...." This language confuses three related but separate areas of jurisdiction under international law: (i) the continental shelf; (ii) the exclusive economic zone; and (iii) archipelago waters. More fundamentally, this provision would give Puerto Rico jurisdiction and economic rights far beyond that exercised by the other states in the Union, which are generally limited to a three-mile limit. Two states, Texas and Florida, enjoy economic rights on the continental shelf out to nine miles because of rights retained at the time of their incorporation into the Union. No state, however, now enjoys such economic privileges beyond that nine-mile limit. Thus, the Puerto Rican right to the whole of the continental shelf would go far beyond rights now enjoyed by existing states.

(3) Military Lands. Section 12(b)(1) of title II (Statehood option) in S. 712, provides that "The Commonwealth of Puerto Rico shall always have the right to serve civil or criminal process" within military property. This would be an unacceptable interference with inherent military functions. It is a long-standing principle applied throughout the United States that military commanders have the right (and duty) to control access to military facilities.

INDEPENDENCE

It is apparent that the proponents of the independence option envision the complete withdrawal of all United States forces from the area (Section 5.2, Title III, S. 712). Although exceptions might be negotiated, demands for withdrawal would seriously impair our ability to interdict drugs in the Caribbean. They would also have a major effect on Coast Guard support for the U.S. Navy in maritime defense. The Department defers further comment to the Department of Defense on the impact of Puerto Rican Independence on U.S. national defense.

Although Puerto Rican independence would relieve the U.S. Coast Guard of responsibility for its statutory missions of search and rescue, aids to navigation, marine safety, and protection of the marine environment for the island itself, it would also deprive the Coast Guard of an important base for operations in the Caribbean to perform these missions in other U.S. possessions in the Caribbean. Therefore, we suggest that provision be made in the proposed bill to ensure the maintenance of U.S. interests in these areas.

Section 5.1 raises transitional questions concerning the application of maritime statutes to U.S. citizens of Puerto Rico who choose to give up their U.S. citizenship. As these concepts, related to vessel ownership and crewing, are quite technical and complex, they require further study, and we would be pleased to work with the committee in further evaluating these concerns.

ENHANCED COMMONWEALTH

A general impact on trust funds and regulations would occur under this option. In addition, important issues are raised in Title IV of S. 712 in both the aviation and maritime areas.

Trust Funds:

Under Subpart 11(a) of Title IV (commonwealth status) the Puerto Rico Federal Relations Act would be amended by inserting a new section 59, which would provide for the consolidation of grants made for specific purposes by any department or agency making grants (other than direct payments to individuals) at the request of the Governor of the Commonwealth. Any such consolidated funds could be used for any of the purposes authorized for any of the source funds. Under these provisions, Airport and Airway Trust Funds could be used for non-aviation purposes, the Highway Trust Fund could be used for non-highway or mass transit purposes, and the Aquatic Resources Trust Fund could be used for non-Coast Guard purposes -- all of which would be in conflict with the authorizing statutes of the respective funds. The ability of the specific agencies to ensure the use of these funds for enhancement of specific and intended modal goals would be impaired.

Regulations:

Subpart 4 would require Federal agencies to evaluate all regulations as they affect Puerto Rico and mandates as guidelines for that evaluation the principles of commonwealth outlined in subpart 3. Rules that are not consistent with that policy would not apply to Puerto Rico. This provision would be extremely difficult to administer because of the vagueness of the principles and would appear to threaten regulatory consistency throughout the United States.

Aviation Negotiations:

The major intent of the aviation provisions of the enhanced commonwealth status (Subpart 5 of Title IV of S. 712) is to grant Puerto Rico independent negotiating authority for bilateral air service agreements. Puerto Rico would be authorized to negotiate with foreign governments for air service rights: 1) between Puerto Rico and foreign points for U.S. and foreign flag carrier services; 2) between other U.S. points and foreign points with Puerto Rico as an intermediate service point for U.S. and foreign flag carrier services; and 3) between Puerto Rico and other U.S. points for service by foreign carriers (cabotage rights).

At the outset, I would like to describe Puerto Rico's existing role in bilateral negotiations, and how existing U.S. international aviation policy and practice fully takes account of the special interests of Puerto Rico.

We recognize the legitimate interest of Puerto Rico in being assured a reasonable opportunity to present its views in bilateral aviation negotiations affecting its interests. Currently, a representative from Puerto Rico may participate in an advisory capacity at U.S. bilateral negotiations with other governments, as do representatives of other U.S. civic interests. U.S. aviation negotiators go to great lengths to obtain the views of interested persons at all aviation negotiations in accordance with the statutory mandate under section 1102(c) of the Federal Aviation Act (49 U.S.C. 1502(c)).

In negotiating aviation agreements with foreign governments, the United States, understanding the special importance of air transportation to non-mainland U.S. points and the relationship of air service to overall economic development, attaches special importance to island services. Generally, little or nothing is expected from foreign governments in exchange for the grant of rights for foreign air carriers to serve Puerto Rico. For example, this past year we granted Paris-Puerto Rico authority to Air France, despite the fact that there is no such right in the U.S.-France aviation agreement. Indeed, we could not imagine denying any foreign carrier application for Puerto Rican authority unless there were extremely grave public interest concerns that so required.

As a result of the continuing U.S. policy in support of Puerto Rican air service, out of some 71 U.S. aviation bilateral agreements (excluding those that came into effect by State succession), San Juan is included for foreign carrier service in 17. Only the U.S. cities of New York, Los Angeles, Miami, and Chicago (in that order) are included more frequently than is San Juan. In addition, foreign governments have the option to select San Juan or other Puerto Rican points for service in nine other bilateral agreements, for a total of 26 agreements that permit service to Puerto Rico. (A listing of these bilateral agreements is provided at Attachment A.) We can recollect no case where a foreign government has sought bilateral rights to Puerto Rico and been denied those rights. Virtually all bilateral agreements authorize U.S. carrier service between San Juan and the foreign country.

With respect to actual air service, Appendix B, (attached) shows that San Juan today receives international air service from 39 foreign destinations. Thus, it is our conclusion that current U.S. international aviation policy and law fully address the air transportation needs of Puerto Rico.

I would now like to comment on the aviation proposals contained in S. 712. The proposal that Puerto Rico obtain authority to negotiate bilateral air service agreements raises several concerns. First, as discussed below, cabotage rights negotiated for foreign carriers could have an adverse impact on services between the U.S. mainland and Puerto Rico. Second, air service agreements entered into might not assure U.S. carriers full reciprocity for services to the foreign country. Finally, we must point out that the grant of bilateral aviation negotiation rights necessarily involves important questions of aviation safety and security, and there is no provision that would assure the maintenance of existing high U.S. standards of aviation safety and security.

Notwithstanding such transportation concerns, we note that the Department of State objects to this provision on more basic Constitutional and foreign policy grounds. In its testimony the Department of State has objected to independent negotiating authority in terms of delegation to another entity of the authority vested in the Executive by the Constitution to conduct and oversee U.S. foreign policy. Also, the Department of State does not acquiesce in any language that would imply a derogation of the President's power to negotiate for and represent the United States, including Puerto Rico, in the area of foreign relations. The Department of Transportation defers to the Department of State on this issue since it pertains primarily to the conduct of foreign relations.

Several questions were raised in the Chairman's June 13, 1989 letter to Secretary Skinner on two issues, denial of service rights to Puerto Rico and cabotage. I would like to respond to your questions.

The letter requested the Department "to supply a list of international carriers who have requested formally or informally additional service and been denied, as well as the reasons for the denial." My staff is unaware of any request that has been denied, although it is possible that there may have been some informal request at some time on which the requester did not follow up.

With respect to cabotage, Section 1108(b) of the Federal Aviation Act (49 U.S.C. 1508(b)) precludes foreign carriers from carrying local "cabotage" traffic between U.S. points. Significantly, at present there is open entry for U.S. carriers in the mainland-Puerto Rico market. Thus, any U.S. air carrier certificated to conduct scheduled services may inaugurate such operations in this market without the need to obtain additional Department authority. Because of this unrestricted U.S. carrier access, we do not believe that conferring cabotage authority in the market to foreign carriers (whether in the context of Puerto Rico negotiating its own bilateral air agreements or otherwise) would lead to any appreciable increase in the level of service now present in the market. Indeed, we believe that were foreign carriers to hold and exercise cabotage authority they would simply draw traffic away from the U.S. carriers now providing such service, and this would likely force some U.S. carriers to cut back their Puerto Rican operations or withdraw from the market altogether. The grant of such cabotage rights would be highly extraordinary under existing international aviation concepts, and we could not anticipate that U.S. carriers would receive comparable benefits in exchange for cabotage authority at Puerto Rico.

Maritime:

1. Implementation of Federal Policy

Subpart 4 of title IV (enhanced Commonwealth) in S. 712 provides that Federal statutory law is inapplicable in the new commonwealth unless it is consistent with the "principles of Commonwealth" in subpart 3, "has proper regard for the economic, cultural, ecological, geographic, demographic, and other local conditions of the Commonwealth of Puerto Rico," or is specifically made applicable by Congress on the basis of an "overriding national interest,... or any Federal statutory law or provision thereof pertaining to the foreign relations, defense or national security of the United Stated that requires uniform applicability throughout the United States,..."

This proviso raises serious concerns, because we believe it is likely to create serious difficulties and confusion. The range of Federal statutory law that would be at issue is so extensive that Congress is unlikely to make and pass the number of specific findings necessary to clarify most of these statutes. In the absence of such enacted findings, the statutes would be subject to litigation on the basis of criteria that are extremely vague. The defendants in a drug trafficking case arising out of a Coast Guard boarding, for example, may be expected to argue in court that Coast Guard boarding authority under 14 U.S.C. 89 is not consistent with "maximum cultural and political autonomy" under the "principles of Commonwealth" in Subpart 3.

This section could also be used by Puerto Rico to erode the Jones Act (46 App. U.S.C. 883, 289), which requires that only vessels constructed in the United States, documented under the U.S. flag, and owned by U.S. citizens can be used to transport merchandise or passengers within the coastwise trade. The Administration is on record as being in strong support of the Jones Act. In Public Law 98-563, Puerto Rico was granted a limited exception for the passenger-carrying trade, but such exceptions are rare. Although the Maritime Administration and the Department of Defense could clearly justify retention of the Jones Act under the national security criterion of Subpart 4, Puerto Rico might argue that the Jones Act does not contribute to its accelerated economic development. Thus, it is possible that Congress would have to make a specific determination in order to retain it.

2. Puerto Rico Federal Maritime Commission

S. 712 (Subpart 8 of Title IV (enhanced Commonwealth)) would enable Puerto Rico to establish its own Commission that would exercise exclusive jurisdiction over service, rates, fares, and practices governing the maritime trade between Puerto Rico and the states of the United States.

At the present time, ocean transportation between Puerto Rico and the United States is regulated by the Federal Maritime Commission (FMC), or the Interstate Commerce Commission (ICC) in the case of intermodal through rates. Regulatory reform affecting both the FMC and the ICC has already taken place, giving shippers and carriers competitive freedom on many rate and service matters, and the Administration is proposing additional deregulation of offshore shipping. If Puerto Rico elects to put in place a more restrictive or protectionist regulatory policy, the current U.S. approach would be hindered. In addition, the creation of a third commission could require the repeal of existing FMC and ICC authority in order to avoid confusion and inconsistency in the treatment of rates.

3. Jurisdiction over Maritime Resources

Subpart 9 of title IV (enhanced commonwealth) in S. 712 would exempt Puerto Rico from the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.). The area of exclusion is defined ambiguously as "zones contiguous to the territorial sea of the Commonwealth". This area of exclusion requires a more precise definition. However defined, this exclusion would allow Puerto Rico a special claim to the economic benefits of United States fisheries. This exclusion would also exempt vessels in these waters from safety requirements otherwise applicable to United States waters, an exception that would not appear to be advisable or justified.

This concludes my prepared remarks. I will be happy to answer any questions members of the Committee may have.

APPENDIX A

U.S. INTERNATIONAL AIR TRANSPORT AGREEMENTS PROVIDING AIR SERVICE RIGHTS TO/FROM SAN JUAN 1/

AGREEMENT PARTIES

1. Aruba
2. Australia *
3. Austria *
4. Barbados *
5. Canada
6. Colombia
7. Costa Rica
8. Denmark
9. Dominican Republic
10. France
11. Germany
12. Jamaica *
13. Mexico
14. Netherlands
15. New Zealand *
16. Norway
17. Philippines *
18. Portugal
19. Saudi Arabia *
20. Singapore *
21. Spain
22. Sweden
23. Thailand *
24. Trinidad
25. United Kingdom
26. Venezuela

* San Juan not specified as a U.S. point for foreign carrier service, but the foreign country/airline has the option to select San Juan.

1/ Listed are bilateral route rights for foreign carrier service to/from San Juan. Virtually all U.S. bilateral agreements authorize U.S. carrier service to/from San Juan and the foreign country.

APPENDIX B

SCHEDULED INTERNATIONAL AIR SERVICE TO SAN JUAN 1/

June, 1989

1. Anguilla, West Indies
2. Antigua, West Indies
3. Aruba, Aruba
4. Barbados, Barbados
5. Barranquilla, Colombia
6. Bogota, Colombia
7. Caracas, Venezuela
8. Cayenne, Fr. Guiana
9. Curacao, Neth. Antilles
10. Dominica, West Indies
11. Fort de France, Martinique
12. Frankfurt, Germany
13. Guayaquil, Ecuador
14. Kingston, Jamaica
15. La Romana, Dom. Republic
16. Lima, Peru
17. London, U.K.
18. Madrid, Spain
19. Mexico City, Mexico
20. Montego Bay, Jamaica
21. Montserrat, Montserrat
22. N. Sound, Virgin Gorda, BVI
23. Panama City, Panama
24. Paris, France
25. Point a Pitre, Guadeloupe
26. Port au Prince, Haiti
27. Port of Spain, Trinidad
28. Puerto Plata, Dom. Republic
29. Punta Cana, Dom. Republic
30. Quito, Ecuador
31. San Jose, Costa Rica
32. St. Barthelemy, Guadeloupe
33. St. Kitts, Leeward Islands
34. St. Lucia, West Indies
35. St. Maarten, Neth. Antilles
36. Santiago, Dom. Republic
37. Santo Domingo, Dom.Republic
38. Tortola, BVI
39. Virgin Gorda, BVI

1/ Single-plane service.

SOURCE: Official Airline Guide.

Mr. SHANE. I have a shorter statement I was planning to read, but I am going to actually abbreviate the shorter statement, because I know that the committee is interested in putting some questions to us.

First, let me address a number of transportation issues arising under S. 712 in the maritime and Coast Guard area, and then I would like to turn briefly to some issues that arise under the aviation provisions. First, on the maritime side, looking at the statehood component of the bill, we have concerns about the impact on federal property. The Coast Guard has a number of properties, and there is a question in our minds, given the language of the bill as presently drafted, as to whether those properties would remain in the Coast Guard, whether the Coast Guard would maintain title over those properties, or whether there would be some other effect.

The CHAIRMAN. Yes. Could you talk about that downtown Coast Guard station?

Mr. SHANE. The downtown Coast Guard station is a particular issue, one which relates, to the aspirations of the people of San Juan to develop Old San Juan, as I understand it. We are certainly apprised of the concern there.

The Coast Guard has special needs which it serves well through the maintenance of that base. They have been in conversation, I know, with the people of San Juan, and indeed, they have been studying the possibility of relocating that base in order to accommodate the needs of the people of San Juan.

It is fair to say that the Coast Guard has yet to be persuaded that there is any other location in that vicinity that would do as good a job as the base at La Puntilla.

The CHAIRMAN. This is an issue that comes up under all three statutes, and we would want to put an urgency to that choice, that alternative choice. Being right down there in Old San Juan, I mean, I do not know that much about what the Coast Guard's needs are—but I can imagine if I were a Coast Guard officer and I had a nice place down in Old San Juan, and I could drop out the back of the building, you know, and walk through Old San Juan and go shopping for curios, it would be very nice.

Now, it is fine for that to be nice, but we do not want to prevent Puerto Rico, under any status option, from having that property, unless it is absolutely necessary. I mean, if we could move out to Roosevelt Roads or something like that—there is a nice Officer's Club out there—let us do that.

Mr. SHANE. Indeed, Mr. Chairman, some Coast Guard functions are already handled at Roosevelt Roads, and that was the principal alternative examined. There is a deep water port at La Puntilla. It supports all Coast Guard vessels in the area. As you know, an important drug interdiction mission is maintained out of San Juan.

While I certainly agree that it must be pleasant to be resident at that base, the fact is that it does have very real advantages in terms of what the Coast Guard is being paid to do down there. But nevertheless, this would be an issue, even if we were not considering the political status of Puerto Rico. We have to take the aspirations of the folks down there very seriously.

The CHAIRMAN. Would you have them look at the property right across the harbor? I do not know exactly where it is, but I am advised that there is property right across the harbor that could be developed. Would you have them consider that and report back to us?

Mr. SHANE. We certainly will, and we will submit a further report for the record on that.

[The requested information follows:]

The Coast Guard believes the property referred to by the Chairman of the facility known as the Army Terminal pier and building in San Juan. Based on a comparison of the facilities at Coast Guard Base San Juan and those at Army Terminal Pier, it does not appear the Coast Guard could relocate its operations without an unacceptable degradation of Coast Guard Caribbean operations during the relocation period.

A 1977 Coast Guard evaluation of the Army Terminal building and pier noted the building to be in very poor condition and questioned the suitability of the pier. A pile-by-pile engineering survey would be required to arrive at an exact cost estimate as major work on a structure of this type could result in massive expenditures. The proposal, as examined at the time, also indicated that insufficient land was available contiguous to the Army Terminal Building to support Coast Guard operations. The evaluation also raised a concern regarding industrial pollution at the facility. We are not aware of any improvements to the Army Terminal facility since the date of our initial evaluation which would lessen our concerns.

The Coast Guard understands the property in question was transferred to the Commonwealth in 1988. However, the US Army Corps of Engineers has been granted a temporary, but indefinite, easement to use the entire pier facility for a breakwater project.

The CHAIRMAN. Thank you.

Mr. SHANE. Still under the statehood option, if I could turn away then from that specific Coast Guard property, we have concerns about the kinds of jurisdiction and economic rights that would flow to Puerto Rico over the continental shelf and the exclusive economic zone. To simply sum up our concern, it appears to us, reading the language of the bill as currently drafted, that Puerto Rico as a state would have rights far in excess of those enjoyed by any other state. This raises a question of fairness in the first instance, but we are certainly prepared to work with the committee on that language.

Turning, then, to the independence option, it will be clear, or at least it is clear to us, that independence would result in the withdrawal of all U.S. forces from Puerto Rico. Again, that provision would affect the Coast Guard. Referring again to the drug interdiction effort currently underway in the Caribbean, I think the committee is aware that there is simply no other mission in the Coast Guard that is more important to the United States right now than that mission. And there is a big question in our minds as to whether it might well be impaired as a result of the independence option, at least, as the language is currently drafted.

There is an impact as well on the Coast Guard's ability to support the U.S. Navy in maritime defense. The independence option would certainly relieve the Coast Guard of its responsibilities for search and rescue, and aids to navigation, and the protection of the marine environment insofar as it would affect Puerto Rico itself, and that might be Puerto Rico's choice.

The concern we have is that it would also deprive the Coast Guard of an important base of operations in order to perform those same functions for other U.S. possessions in the Caribbean. We would be looking for some further work on that language.

There are technical problems affecting the implementation of various maritime statutes that result from the impact of independence on citizenship. We can work with the staff on that. It affects vessel ownership rules, crewing rules and the like. I do not want to take up the committee's time right now to discuss those.

Turning now, finally, to enhanced commonwealth, still staying now on the maritime and Coast Guard side, we are concerned about subpart 4 in Title IV, which is generally referred to as the implementation of federal laws. There is, we believe, a real invitation to confusion and a lot of litigation.

The **CHAIRMAN**. We talked about that in other contexts, so you do not need to deal with that.

Mr. **SHANE**. Thank you.

We think there could be a specific impact on the implementation of the Jones Act, which affects U.S. shipping, and we are specifically concerned as well about the authorization to establish a Maritime Commission for Puerto Rico which would have jurisdiction concurrent with that of the present Federal Maritime Commission. It is a problem that would simply have to be worked out in drafting.

If I may, then, I would like to turn to aviation, which arises principally under the enhanced commonwealth option. Let me say at the outset that prior to the hearing I had the privilege of some informal conversations with representatives of Puerto Rican interests, and it may be, happily, that there is less disagreement here than meets the eye, at least upon our first reading of the bill. And so it may be that some of the problems that I discuss can be taken care of quite easily through the drafting process. Let me at least apprise the committee of our main areas of concern. The major intent of the aviation provisions of the enhanced commonwealth option, which is subpart 5 of Title IV, is to grant Puerto Rico independent negotiating authority for bilateral air service agreements. As we read the bill, Puerto Rico would be authorized to negotiate with foreign governments for air service rights, first between Puerto Rico and foreign points for both U.S. and foreign flag carrier services; second, between U.S. points other than Puerto Rico and foreign points with Puerto Rico as an intermediate service point for U.S. and foreign flag carriers; and finally, between Puerto Rico and other U.S. points for service by foreign carriers.

It is in that third element, which we normally refer to as cabotage, the right of a foreign carrier to pick up traffic in one U.S. point and carry that traffic to another U.S. point, that there may be some confusion, and it may be that, at least on the basis of conversations I referred to earlier, that there is no real difference of view. It may be that the intention was not to include cabotage rights in the legislation. That is something that we will certainly pursue with the staff.

As the result of a longstanding U.S. policy fully in support of U.S. international air service to and from Puerto Rico, San Juan is now included as a U.S. gateway for foreign carrier service in 17 of some 71 U.S. aviation bilateral agreements. Only the cities of New York, Los Angeles, Miami and Chicago are included more frequently than San Juan is. In addition, foreign governments have the option to select San Juan or other Puerto Rican points for service in nine other bilateral aviation agreements, meaning that there is a total of 26 agreements right now that specifically permit foreign flag service to Puerto Rico.

I am submitting for the record a list of those bilateral agreements. More important, however, is the fact that we can recollect no case where a foreign government or a foreign airline has sought bilateral rights to fly to Puerto Rico and yet has been denied those rights. Virtually all of our bilateral agreements authorize U.S. carrier service between San Juan and the foreign country in question.

With respect to actual air service, I am also submitting for the record a list of the 39 foreign points from which San Juan today receives international air service. Based on that material, it is our conclusion that current U.S. international aviation policy and law fully address the air transportation needs of Puerto Rico.

Several questions, Mr. Chairman, were raised in your letter of June 13th to Secretary Skinner on two issues: first, the denial of service rights to Puerto Rico, and second, again, the cabotage question that I referred to earlier. Let me respond, if I may, to those questions.

The letter asked DOT to supply a list of international carriers who have requested, formally or informally, additional service and been denied, as well as the reasons for the denial. Consistent with what I said just a moment ago, my staff is unaware of any request that has ever been denied from a foreign flag carrier to serve Puerto Rico. In fact, I can say—and I speak as someone who has just left four years of service at the State Department negotiating bilateral agreements—that we certainly did everything we could to push foreign flag carriers at Puerto Rico. It never would have occurred to us to say no if anybody had asked for an opportunity to provide that service.

Again, with respect to cabotage—and here I am not going to spend very much time, because it may be that this is a problem that can be very easily worked out—there is a provision, in the Federal Aviation Act that simply precludes foreign carriers from carrying so-called cabotage traffic between U.S. points. We have no monopoly on that provision. There is no country in the world that allows a foreign flag carrier to carry domestic traffic between its own domestic cities.

Remember, please, that the mainland-Puerto Rico market is completely deregulated for U.S. carrier service, so that it would be possible for any U.S. carrier that wants to put service into that route from any U.S. city on the mainland to Puerto Rico to do so without seeking any permission whatsoever from the Department of Transportation. Any U.S. carrier certificated to conduct scheduled service—in other words, any airline that has a license—may inaugurate such operations in that market without any further request to us.

Because of that unrestricted U.S. carrier access, we honestly do not think that allowing foreign carriers into that market would really create any material increase in the amount of service in that market. In fact, paradoxically, allowing foreign carrier service in that market could actually be counterproductive. It might scare away some marginal U.S. carriers, and we think that it could in that way actually diminish the amount of mainland-Puerto Rico service that is currently available.

Mr. Chairman, let me just stop my remarks there. I would be very happy to answer any questions the committee may have. Thank you.

The **CHAIRMAN**. Thank you very much.

Rather than go to our next witness—we have a vote on—I thought I would ask a few questions, and then at the midpoint of the vote I will abruptly rush over and vote and come back.

As I understand it, Mr. Shane, you are saying on aviation, the first two kinds of service, which would not violate cabotage, would be suitable for you. In other words, you would have no objection to granting to Puerto Rico the right to—let me see that language here.

The language begins, "The government of Puerto Rico shall have authority to negotiate on its own behalf bilateral air transportation agreements governing the operation of air services by United States and foreign air carriers between the Commonwealth and foreign points." Up to that point it would be perfectly fine?

Mr. **SHANE**. Mr. Chairman, I am aware that there are concerns on the part of the Department of State about delegating bilateral negotiating authority, if you like, to anyone besides the Federal Government in Washington. Those objections, I guess, have to be addressed, but as to the specific services that are contemplated in the first two categories, they are precisely the kinds of services we have been trying to develop for Puerto Rico through the existing negotiating process.

The **CHAIRMAN**. Well, it seems to me that if they want authority to negotiate those kinds of things which you say we are allowing them to do, there should not be any reason to prohibit them going ahead and doing it, is there?

Mr. **SHANE**. I would not want to divest the Department of State of at least concurrent authority to negotiate rights for U.S. carriers to serve routes between Puerto Rico and foreign countries at the same time. In other words, that is what the State Department does, along with all of its other responsibilities. U.S. carriers are seeking rights to serve foreign countries from U.S. points.

The right to serve a foreign point from Puerto Rico might very well come up in the context of a negotiation that the State Department was conducting. The right of a foreign carrier to serve Puerto Rico from its own homeland might come up in a negotiation in which the State Department is obliged to conduct with a foreign government. And it seems to me that we would have to think hard about how the two negotiating authorities, if you will, do not become crosswise with each other in dealing with, in effect, the same request.

The **CHAIRMAN**. I wish you would give this preferred attention, because I can understand the cabotage. In other words, you do not want Puerto Rico to be negotiating what then would amount to air rights for U.S. carriers, which affect the United States airports.

But it seems to me, if you say everything we do is to encourage these flights to Puerto Rico and vice versa, that we could, for the purpose of those things which we are now allowing, we could let Puerto Rico negotiate that. That is important to them, and we want to allow a maximum of self-government consistent with the commonwealth status under that option.

And, you know, there are some purists in every department who say absolutely no, there is no way we can give one jot or tittle of our authority away. And yet, you try and get an answer from them on something, as you did from Treasury today, I mean, sometimes you cannot do it. And so I want to give them that authority if I can.

And so with that, I will go vote and be right back.

[Recess.]

The CHAIRMAN. Mr. Shane, I understand you have just had a conversation with some of the Commonwealth people. Is there anything, based on that, that you can further elucidate, or would you care to, or just as soon do that later in writing?

Mr. SHANE. Mr. Chairman, the conversation was prior to the time I testified actually. And we have been talking in the interim, and I am pretty confident that on the cabotage question we ought to be able to work out an accommodation without a great deal of fuss.

The CHAIRMAN. You might, if you would, give us the language you would agree to, if you agreed to the principle. I mean, in other words, if negotiation is no problem, if you could give us the substance of what you would agree to, and then we can argue out the question of whether this conflicts with the ability of the administration to negotiate. But as a separate thing, in other words, we would like the language that works if we take that view.

Mr. SHANE. We would be happy to submit that for the record.

[The requested material follows:]

As originally drafted, the civil aviation provisions of the enhanced commonwealth option granted Puerto Rico independent negotiation authority and the right to authorize prohibited cabotage operations by foreign carriers between Puerto Rico and the mainland United States.

In my testimony, I stated that the Department has serious reservations about these provisions and that it believes that U.S. aviation policy and practice fully takes account of the special interests of Puerto Rico.

Since the date of this hearing, the aviation section of the enhanced commonwealth option (Section 405) has been amended to eliminate these provisions. The aviation section, as revised, provides that the Departments of State and Transportation shall seek the advice of appropriate officials of the Commonwealth of Puerto Rico when negotating any air transportation agreements which would affect air traffic to or from the Commonwealth of Puerto Rico. The Department of Transportation has no objection to Section 405 as ordered reported by the Senate Energy and Natural Resources Committee.

The CHAIRMAN. Now, Mr. Brennan.

STATEMENT OF JAMES W. BRENNAN, ASSISTANT ADMINISTRATOR FOR FISHERIES, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

Mr. BRENNAN. Thank you, Mr. Chairman.

My name is James Brennan. I am Assistant Administrator for Fisheries with NOAA. NOAA is concerned with the conservation and management of the fishery resources off the coast of the United States and for protecting marine mammals and endangered species.

The CHAIRMAN. Could I interrupt to say something before I forget it, and this goes to all witnesses, all administration representatives. And I would like to—let us put this in writing in a letter; that is, to encourage all of you to meet with the three groups so as to facilitate an understanding of what they have in mind. And to the extent you have an objection, maybe you can clear it up so that you could give us advice on how we might work out something that works. Because, you know, there is nothing like a dialogue.

Please excuse the interruption.

Mr. **Brennan**. Yes, sir. We will most certainly do that. I will attempt to cut my testimony to the areas that are perhaps of more interest to NOAA specifically. Many of the suggestions that we have had I have heard mentioned by other witnesses, and so I will just try to deal with the areas of particular concern to NOAA.

An exemplary, if you will turn to subpart 9 of Title IV dealing with jurisdiction over maritime resources, this would give the new commonwealth exclusive control over the fishery resources of the exclusive economic zone off Puerto Rico, thereby allowing Puerto Rico to impose, for example, fees and restrictions on domestic U.S. fishing vessels for other than highly migratory species. By clear implication also, this would allow the new commonwealth to regulate the taking of highly migratory species within the exclusive economic zone by vessels of other countries.

The **Chairman**. Now, tell us about that, tuna in particular.

Mr. **Brennan**. Mr. Chairman, the position of the United States has been, historically, that tuna are a highly migratory species that move from one jurisdiction to another; and the only practical way to regulate these species is, in fact, through international regimes, so that all of the countries through whose jurisdiction these fish pass can get together and come up with an appropriate conservation regime throughout the range.

The **Chairman**. Now, do I understand that tuna is a very controversial species?

Mr. **Brennan**. Yes, Mr. Chairman. The tuna has been.

The **Chairman**. It is one of these things you say just do not even ask?

Mr. **Brennan**. Well, you are certainly always allowed to ask, Mr. Chairman. I will try my best to answer.

What we are dealing with here is that the United States does not recognize the right of any coastal state to exercise exclusive jurisdiction over highly migratory species such as tuna.

The **Chairman**. I am satisfied on that. I think we figured that out the first day before we even heard your testimony.

Mr. **Brennan**. Yes, sir. There are some arguments about this that are being discussed in other fora.

One of the ways we regulate fish, just as an aside, is through the Magnuson Act and the councils established under the Magnuson Act. Now, the Caribbean Fishery Management Council is composed of Puerto Rico and the Virgin Islands. We are concerned if Puerto Rico were excluded from the purview of the Magnuson Act, we would be faced with a very difficult situation with respect to the Virgin Islands themselves. We would have to deal somehow with fishery management in the Virgin Islands, if the Magnuson Act were no longer applicable to Puerto Rico.

I think what you have heard is our concern about extended jurisdiction of the state with respect to fishing rights from vessels from other states, and our concern about highly migratory species and the fact that inclusion would be contrary to our established international position. I think, from my perspective, that these probably are the two points that I think I would like to specifically allude to in the oral testimony and submit the rest of my testimony for the record, if you will.

[The prepared statement of Mr. Brennan follows:]

TESTIMONY OF

JAMES W. BRENNAN
ASSISTANT ADMINISTRATOR FOR FISHERIES
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
DEPARTMENT OF COMMERCE

Before the

COMMITTEE ON ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE

July 13, 1989

Mr. Chairman and Members of the Committee:

I am James W. Brennan, Assistant Administrator for Fisheries of NOAA in the Department of Commerce. It is a pleasure to be here today to present to you the views of the Department of Commerce on S. 712. NOAA is the Federal Government's civilian oceans and atmospheric agency. Our interests are largely in scientific and technical issues. NOAA is also responsible with the eight Regional Fishery Management Councils for conservation and management of fisheries off the coasts of the United States, and for protecting marine mammals and endangered species. These are programs with which I work personally. NOAA also assists the States with regard to management of the coastal zone. NOAA is thus responsible for some broad areas of interest that would be affected by the legislation before this Committee today.

The Committee is considering three different approaches to conducting a referendum to allow the people of Puerto Rico an opportunity to choose between statehood, independence, and commonwealth status. We are concerned with the effect of provisions of titles II and IV.

Section 5 of title II (statehood), regarding state title to lands and property, provides that the new State of Puerto Rico would have "exclusive right to explore, exploit, lease, possess and use all seabed, natural, and mineral resources lying within the 200 mile economic zone continental shelf boundary around the waters of the Archipelago of Puerto Rico...." This section would grant the new State of Puerto Rico far greater jurisdictional and economic rights than those of other States. This change would represent a significant departure from longstanding policy and existing State/Federal relationships. We also question the effect this provision would have on living marine resources. Our concerns are similar to those discussed with regard to subpart 9 of title IV, which I will address.

Title IV of S. 712 (enhanced Commonwealth) includes several provisions which give us great concern, and raise issues which we believe the Committee must consider seriously.

Subpart 9 of Title IV deals with jurisdiction over maritime resources. This subpart would exclude the new Commonwealth of Puerto Rico from the Magnuson Fishery Conservation and Management Act and would give the new Commonwealth exclusive control over the fisheries resources of the Exclusive Economic Zone (EEZ) off

Puerto Rico. This would allow the Commonwealth, for example, to impose fees and restrictions on U.S. vessels fishing for other than highly migratory species. By clear implication, it would also allow the new Commonwealth to regulate the taking of highly migratory species within the EEZ by vessels of other countries.

The presence of another, independent fishing jurisdiction would complicate an already complex jurisdictional situation in fisheries. Currently, under the jurisdiction of the Caribbean Fishery Management Council, Puerto Rico shares fishery management responsibility for certain fishery resources, including sharks, swordfish and billfish, which migrate throughout the Atlantic and Caribbean areas. The South Atlantic, Gulf of Mexico, Mid-Atlantic and New England Fishery Management Councils share this authority. If Puerto Rico were given independent status with regard to fishery conservation and management, effective coordination and implementation of fishery management and conservation laws and policies would be much more difficult.

Fisheries should only be managed throughout their range. One management problem we have today is the multiplicity of jurisdictions involved in making fisheries management and conservation effective. The Committee should consider the inevitable precedent for further splitting up fisheries jurisdiction by creating more independent management authorities. Other territories or commonwealths, or even other States, could conceivably make arguments that their particular circumstances warrant a deviation from the existing management structure.

In addition, S. 712 does not specifically address the new Commonwealth's status relative to the Caribbean Fishery Management Council established under the Magnuson Act. Currently, the Caribbean Council consists of Puerto Rico and the Virgin Islands. If Puerto Rico were excluded from the Magnuson Act, we question the effect on the Council and the Virgin Islands.

Puerto Rico's exclusion from the Magnuson Act would be inconsistent with the current U.S. policy on tuna. The United States does not recognize the right of coastal States to exercise exclusive fisheries management jurisdiction over highly migratory species on the high seas. By specifically providing that the new Commonwealth of Puerto Rico could not regulate vessels of the United States fishing for highly migratory species, the bill implies that the Commonwealth could regulate vessels of other countries. Thus, this provision of the bill would signal a change in the position of the United States and could undermine our negotiating position on this issue.

We also believe the Committee must consider the effect of subpart 4 of title IV on other important conservation laws. Subpart 4, regarding implementation of Federal policy, provides that Federal statutory law is locally inapplicable unless it is consistent with the policy established under subpart 3 and unless it has "proper regard for the economic, cultural, ecological, geographic, demographic and other local conditions of the Commonwealth of Puerto Rico." The policy of the United States established under subpart 3 is to "enhance the Commonwealth relationship enjoyed by Puerto Rico and the United States" and to enable the people of Puerto Rico "to accelerate their economic and social development and attain maximum cultural and political autonomy within permanent union with the United States." This provision raises questions about the application of the Marine Mammal Protection Act of 1972 and the Endangered Species Act, and all of the other environmental and marine resource programs for which we are responsible, and which provide vital protection to important resources. It would appear these laws might not be consistent with the policy set forth in subpart 3 and so may not be applicable in the new Commonwealth. The United States has established a clear leadership position in the world conservation community, and this could be interpreted as backing off at a time when there is a critical need for helping these animals. We also are uncertain as to the effect of subpart 4 on the application of the Coastal Zone Management Act.

Mr. Chairman, we appreciate the work the Committee is doing in this regard and the need to be responsive to the concerns of the people of Puerto Rico. We also recognize that S. 712 deals, directly and indirectly, with some of the most important marine resource conservation legislation that the United States has enacted. We urge the Committee to give these issues careful consideration as it evaluates the bill. We are willing to work with the Committee in this regard.

Thank you, Mr. Chairman.

The **Chairman**. All right, Mr. Brennan. I understand about the migratory fish, the national interest and all of that. But with respect to other regimes, for example, billfish, I understand, do not actually travel between Puerto Rico and the mainland fishery zone. Excuse me—non-billfish.

What we would like to do—I mean, I am not concerned about there being a uniformity between the exact number of miles for an economic zone for Puerto Rico and other states, because there is no uniformity right now. My state has three miles. Neighboring Texas has 10 miles. And so we have oil within our three miles, and Texas within its 10 miles; and Puerto Rico does not have that. And to the extent that it does not conflict with the national interest, and it is down there a good ways from the mainland, we would like to give as much jurisdiction over that zone as we can.

Now, migratory fish, no. How would it work on non-migratory fish? Are there other resources there?

Mr. **Brennan**. Yes, there are some other resources. There are two fishery management plans that are regulated by the Fishery Management Council. As I said earlier, that council is composed of the U.S. Virgin Islands and Puerto Rico. It would—we have found that the best way to regulate a fishery is throughout its range, and the range may be somewhat attenuated for some of the species around the islands like Puerto Rico and the Virgin Islands.

But it seems to us that they should be regulated as a unity by the members of the Fishery Management Council grouping. We would be splitting up and having two regimes, one for the Virgin Islands and one for Puerto Rico, and it would leave us at kind of loose ends, I think, in those fisheries.

The **Chairman**. Well, if you would take a look at what could we safely give that the United States does not need which would be of some value to Puerto Rico. We are looking for a way to do that. Your answer may be nothing at all, because it is all interrelated. But help us with that, if you would.

Now, Mr. Raul, nutrition assistance right now to go to statehood with full programs would cost an additional $300 million with food stamps, is that correct?

Mr. **Raul**. Yes, Mr. Chairman. That is our best estimate at this time.

The **Chairman**. Now, tell me about Farmers Home. You have loan guarantees under Farmers Home. What is your advice on the independence option on those loan guarantees?

Mr. **Raul**. Mr. Chairman, I believe that in Puerto Rico at this time we have some guaranteed loans from Farmers Home, but we also have a large portfolio of direct loans extended by Farmers Home and by the Rural Electrification Administration in Puerto Rico. The amount outstanding under those programs is about $1½ billion, face value. We would, therefore, feel that either we should retain those loans, or transfer them, with some compensation, or permit Puerto Rico to purchase the assets.

The **Chairman**. To purchase the loan portfolio?

Mr. **Raul**. Yes.

The **Chairman**. Well, it seems to—have you thought through the question of trying to enforce loans in an independent country?

Mr. RAUL. Well, we think that the assets should not be transferred to an independent country without any form of compensation, but clearly having instrumentalities of the United States with a continuing interest in loans in an independent nation would be problematic.

The CHAIRMAN. Well, clearly—there would have to be some transfers to Puerto Rico in the event that they became an independent country, some kind of transition fund. It seems to me that would be a very appropriate source of a transfer.

Now, we would have to give them, it seems to me, some monies for a period of time within which to replace these grants. We have talked about, in an independent situation, a three-year period in which nothing happens, and then after that we would give grants to take the place of social security, food stamps, et cetera, grants on an ever decreasing amount over a period of time.

It seems to me that some of these guaranteed loans might be an appropriate way to make a grant, to put a value on the loans. I do not know whether they were at face value. I would doubt it very seriously. But to put a value on those and transfer those to the government of Puerto Rico and count against that grant—Can you think of a better way to do it than that?

Mr. RAUL. Well, it sounds, Mr. Chairman, like what you are suggesting is some form of compensation for the transfer of the assets, and I think that that is a reasonable way to approach it. And we would be pleased to develop some legislative language to submit to you on that point.

The CHAIRMAN. Now, with respect to guarantees, we have got all kind of species of guarantees. You have got some that you do not say grace over: FDIC, FSLIC, all of those, the Farmers Home Loans. How would we treat those under independence?

Mr. RAUL. Well, the guarantees, as I mentioned before, I think it a relatively smaller portion of our loans outstanding in Puerto Rico. But if the guarantee is in place in a loan that is currently outstanding in Puerto Rico, there is no suggestion that that guarantee can or should be immediately extinguished.

The CHAIRMAN. Can it be extinguished?

Mr. RAUL. I would think that perhaps in exchange for some compensating benefit, perhaps as some form of—if it were replaced with some other type of either—not an equivalent guarantee, but perhaps some other economic benefit.

The CHAIRMAN. It seems to me that most of these guarantees are going to have to be phased completely out over time. For example, we could not guarantee bank deposits to $100,000 per deposit and have no control over the bank, over all of its practices, its capital, et cetera.

Now, by the same token, under a loan guarantee on Farmers Home, if you have no control over access to the courts or procedures under which the courts operate or the substantive law under which you can sue to collect your loan in the event of a default, you obviously cannot continue to guarantee that loan.

So some kind of transition extinguishment of that guarantee must be provided for. And we would like your advice on how to do that. Have you got any ideas?

Mr. Raul. Well, not at this moment. But I would be happy to provide some for you. Although I would note that the situation is not, I believe, quite the same as with a bank which would be receiving insured deposits, because upon dependence, we would suppose that the programs would themselves terminate. So that what we would be left with would be essentially a contract between Farmers Home and a citizen or resident in Puerto Rico.

So that, presumably, the contractual obligations would continue on both sides. And what would change would be the forum in which that contract would be resolved. And I am not familiar at this time with whether the choice of law provision or the applicable legal system that would apply would remain U.S. law under the existing contracts. That would require further research.

The Chairman. Well, the properties in Puerto Rico, you could not enforce that contract in a U.S. court against property in Puerto Rico, could you?

Mr. Raul. Mr. Chairman, I am honestly not certain of the answer on that. Because there are contracts between parties of different nations in many contexts. And frequently they can be adjudicated in the courts of one nation or the other, between the two parties to that contract. So it is not clear to me that the fact of independence would have an immediate legal impact on the existing contractual obligations.

The Chairman. Well, you know it seems to me we need some creative result here. And just thinking off the top of my head, perhaps we could create some new creature under Puerto Rican law and let it succeed to the guarantees that the United States makes in all of these areas, and fund it with some kind of transition grant. That might be a good place to put the transition grant, with provisions that the grant would have to remain in there, subject to withdrawing only to pay off its obligations for that guarantee.

Now whether the holder, in due course—whether there would be problems there—there probably would be. Why don't you give some creative thought to that? Because we have got these guarantee situations across a broad range of provisions.

It would seem to me that maybe you could create this Puerto Rican guarantee corporation that guarantees everything that we guarantee, and transfer to it some of those notes we hold in Puerto Rico, in sufficient value to cover that. And maybe that way we could get out from under that obligation. Take a look at that if you would.

Mr. Raul. Yes, sir.

The Chairman. Now on El Yunque, what do we spend on El Yunque per year?

Mr. Raul. What, Mr. Chairman, are you referring to?

The Chairman. That is the Caribbean National Forest.

Mr. Raul. Oh, I am sorry. I believe—I do not have the exact figure in front of me, Mr. Chairman. I believe that we have some figures that we——

The Chairman. Well, let me give you another question here on Farmers Home. We have been talking about a transition where nothing changes for a while. Could we do that with Farmers Home as well? Would that work—to continue to make loans?

Mr. Raul. That would be under which of the options?

The CHAIRMAN. Well, the one we are thinking about here, is independence. It seems to me independence is the only option that really gives a problem of transition on these things.

Mr. RAUL. I think that under the independence option, a transitional period where we would continue to extend new loans would be not entirely consistent with the idea of independence and two sovereign nations——

The CHAIRMAN. Well, we are not worried about that. I mean, what we are worried about is the practicality of working it out. I mean, we can tend to the question of consistency to something, but we want an independence option that works. We do not want the economy to come crashing down while they are putting together a new form of government, which would take some time. So if you would give it to us in writing, as to the question of whether you could continue all of the programs under Agriculture for a period of time, in which you continue to give the full range of services, continue to extend credit, or whether, during that initial transition period under independence, you should modify that.

Again, what we have in mind is a period of time—I have used the period three years—within which nothing changes. Thereafter, we give categorical grants on a sliding scale, coming down over a period of years, to ease in the transition. And so the question is: In that initial three years, can you or should you continue to give all services?

If you would give us answer to that?

Mr. RAUL. Yes, Mr. Chairman. I have the information you requested in the prior question. In 1989, the Department spent about $1.5 million on tropical forestry research; and another $1.8 million to manage the forest.

The CHAIRMAN. And it is your feeling that the United States, under commonwealth or, obviously statehood, should continue to perform those services?

Mr. RAUL. Yes, Mr. Chairman. We feel very strongly that the forests should remain in the national forest system. It is a unique asset in our national forest system. It is the only tropical forest that we have in the system. And it is very important to the tropical forestry work that the Forest Service does.

The CHAIRMAN. Now, would Agriculture have any objection to language that says that, with respect to any appointments above a certain level of people in the Agriculture Department who work there, including the manager or—what do you call it?—the director at El Yunque, that he be appointed in consultation with the Governor of Puerto Rico?

Mr. RAUL. Well, that poses issues, I think more properly addressed, perhaps, by our colleagues at the Department of Justice. That is a——

The CHAIRMAN. Yes, we already talked to them. [Laughter.]

Mr. RAUL. Well, I trust that they provided an answer or at least a suggestion on that. [Laughter.]

The CHAIRMAN. They gave us an answer but, at least from my point of view, there is no reason not to consult or not to write that in the statute.

Mr. RAUL. I am sure that on any such appointments——

The **Chairman**. Now let me ask you this. What would be wrong with transferring the title to Puerto Rico, under a commonwealth option, of these national historic sites, including the El Yunque Forest, but subject to an operating agreement to be confected prior to the transfer?

Mr. **Raul**. Well, it would have the effect of removing the legal title from the Forest Service, from the Department, and might, therefore, not ultimately be as satisfactory as maintaining the forest as part of the national forest system. So that it would pose possible ramifications that could not fully be anticipated.

I think that we feel that the forest is really, as I said, a unique asset and a crucial one to the overall forest system. It is not a——

The **Chairman**. I am sure Puerto Rico feels the same way. [Laughter.]

Mr. **Raul**. Yes, Mr. Chairman. But from the standpoint of the Forest Service and our obligation and responsibility for national forests throughout the United States, this asset is not replicated anywhere else.

The **Chairman**. All right. We have got a vote on, and we are past the half-way mark. So I think this is probably a good time to go ahead and close down the hearings for the day.

Gentlemen, I want to thank you very much for your testimony. Obviously, we may have questions in writing. We have already solicited further elucidations of your position.

Again, I emphasize that we are going to mark-up in just a couple of weeks. So, on each of these subject areas, if you can consult with us, consult with the Puerto Ricans in each of the three parties and give us language—and OMB. In other words, this ought to be a time of furious activity for all of us in coming up with some answers.

Thank you very much for being helpful to the committee.

Mr. **Raul**. Thank you, Mr. Chairman.

[Whereupon, at 4:55 p.m., the hearing was recessed, to reconvene Friday, July 14, 1989.]

POLITICAL STATUS OF PUERTO RICO

FRIDAY, JULY 14, 1989

U.S. Senate,
Committee on Energy and Natural Resources,
Washington, DC.

The committee met, pursuant to notice, at 10:03 a.m., in room SD-106, Dirksen Senate Office Building, Hon. J. Bennett Johnston, chairman, presiding

The **Chairman**. The hearing will come to order.

This morning our first witness is Senator Paul Simon, who is at another hearing at this time and will be here shortly. So, we will commence with Mr. Tim Glidden, who is counsel to the Secretary of the Department of Interior.

STATEMENT OF TIMOTHY GLIDDEN, COUNSELOR TO THE SECRETARY OF THE INTERIOR

Mr. **Glidden**. I am pleased to appear before you today to discuss S. 712, a bill to provide for a referendum on the political status of Puerto Rico.

I note initially that many of the issues covered by Title IV of S. 712, dealing with the commonwealth status, may be similar to issues raised in S. 317, a bill to establish the Commonwealth of Guam, and for other purposes.

In May 1988, a Federal Interagency Task Force was established to review the Guam Commonwealth legislation. The task force recently completed a report on the Guam legislation. It is being reviewed within the Administration and will be transmitted shortly to Congress. We hope the Committee will review the Administration's report on Guam, being mindful of the interests of both insular areas in such political status legislation.

Because this Department's general administrative responsibility for Puerto Rico ceased in July 1952 when the Commonwealth came into being, my comments on the legislation will be confined largely to matters within the Department of Interior's current program responsibilities.

As to the specific provisions of S. 712, Title II, section 5(b), provides that, if Puerto Rico becomes a state, it will have the exclusive right to explore, exploit, lease, possess and use all seabed, natural, and mineral resources lying within the 200-mile exclusive economic zone around it.

No state has that right. Under the Submerged Lands Act, coastal states currently have the right to minerals within three miles and, in certain limited cases, three marine leagues from their coastlines.

In 1980, Congress gave Puerto Rico all right, title and interest in and to resources underlying submerged lands within the three marine leagues of its coastline. We recommend against any additional grant of mineral ownership to Puerto Rico for purposes of this title of the legislation.

Title IV, subpart 4, of S. 712 states that federal statutory law is locally inapplicable unless it is consistent with the policy established under subpart 3, and unless it has proper regard for the economic, cultural, ecological, geographic, demographic and other local conditions of Puerto Rico.

Part of the policy stated in part 3 is that the United States will enhance its relationship with Puerto Rico in order to enable the people of Puerto Rico to accelerate their economic and social development and attain maximum cultural and political autonomy.

The consistency requirement of Title IV, subpart 4, could cast doubt on the applicability of the National Environmental Policy Act, the Endangered Species Act, and numerous other environmental and other laws that might be considered obstacles to the policy stated in subpart 3. Laws that impose economic hardship also might fail this consistency test. In short, this provision will most likely be a constant source of litigation and dispute.

Title IV, subpart 6, of S. 712 provides that, if Puerto Rico remains a commonwealth, no areas may be included in the Coastal Barriers Resources System. The CBRS, as established by the Coastal Barrier Resources Act of 1982, is made up of undeveloped and unprotected coastal barriers. If an area is included in the system, it is no longer eligible for new federal flood insurance, or federal financial assistance or subsidies that promote growth or development.

Section 10 of the Act requires the Secretary of the Interior to report on the system and recommend to the Congress additions, deletions, or changes to it. Those recommendations were made in January 1989, but only go into effect if Congress acts upon them.

The January 1989 report recommended in Volume 21 that 42 units in Puerto Rico be added to the system, comprising 21,500 acres, nearly 19,000 of which were wetlands. These areas provide protection for associated aquatic habitats and the Puerto Rican mainland and are subject to wind, wave and tidal energies, and to severe flooding and overwash during storms.

The Federal Government could save a total of approximately $50 million over a 20-year period by including this acreage in the system. This estimate is based on estimated federal development monies which otherwise would be spent to subsidize development on these coastal barrier units and includes the following costs: sewers and wastewater treatment; water supply; bridges, causeways and roads; disaster relief; flood insurance; and shore protection.

We believe that exclusion of areas in Puerto Rico from the system would establish a precedent that ultimately might undermine the purposes of the Act.

S. 712, Title IV, subpart 11(a), deals with consolidation of grant-in-aid programs. Under that section, the Department, and any other federal department or agency, must consolidate all grants given to Puerto Rico if requested to do so by the Governor. Similar grant consolidation authority currently exists for the territories, but consolidation is at the discretion of the agency involved.

This subpart also provides that consolidated grant money would have to be spent in furtherance of the programs and purposes of the consolidated grants, but Puerto Rico would determine the proportion of the funds granted which shall be allocated to such programs and purposes. This could be interpreted to mean that Puerto Rico could use funds from one grant program to supplement funds from another.

The Department has numerous grant programs under which Puerto Rico receives funds. These include grants from the United States Geological Survey, the National Park Service, the United States Fish and Wildlife Service, and the Bureau of Mines.

[The prepared statement of Mr. Glidden follows:]

TESTIMONY OF TIMOTHY GLIDDEN, COUNSELOR TO THE SECRETARY, BEFORE THE COMMITTEE ON ENERGY AND NATURAL RESOURCES, UNITED STATES SENATE, REGARDING S. 712, A BILL "TO PROVIDE FOR A REFERENDUM ON THE POLITICAL STATUS OF PUERTO RICO."

July 14, 1989

Mr. Chairman, I am pleased to appear before you today to discuss S. 712, a bill "To provide for a referendum on the political status of Puerto Rico."

I note initially that many of the issues covered by Title IV of S. 712, dealing with Commonwealth status, may be similar to issues raised in S. 317, a bill "To establish the Commonwealth of Guam, and for other purposes." In May 1988, a Federal Interagency Task Force was established to review the Guam Commonwealth legislation. The Task Force recently completed a report on the Guam legislation; it is being reviewed within the Administration and will be transmitted shortly to the Congress. We hope the Committee will review the Administration's report on Guam, being mindful of the interests of both insular areas in such political status legislation.

Because this Department's general administrative responsibility for Puerto Rico ceased in July 1952 when the Commonwealth came into being, my comments on the legislation will be confined largely to matters within the Department of the Interior's current program responsibilities.

As to the specific provisions of S. 712, Title II, section 5(b), provides that, if Puerto Rico becomes a State, it will have the exclusive right to explore, exploit, lease, possess and use all seabed, natural, and mineral resources lying within the 200 mile exclusive economic zone (EEZ) around it. No State has this right. Under the Submerged Lands Act, coastal States currently have the right to minerals within 3 miles, and, in certain limited cases, 3 marine leagues, from their coastlines. In 1980, Congress gave Puerto Rico all right, title, and interest in and to resources underlying submerged lands within 3 marine leagues of its coastline. (48 USC 749). We recommend against an additional grant of mineral ownership to Puerto Rico for purposes of this title of the legislation.

Title IV, Subpart 4, of S. 712 states that Federal statutory law is locally inapplicable unless it is consistent with the policy established under Subpart 3 and unless it has proper regard for the "economic, cultural, ecological, geographic, demographic and other local conditions" of Puerto Rico. Part of the policy stated in Subpart 3 is that the United States will enhance its relationship with Puerto Rico in order "to enable the People of Puerto Rico to accelerate their economic and social development and attain maximum cultural and political autonomy."

The "consistency" requirement of Title IV, Subpart 4 could cast doubt on the applicability of the National Environmental Policy Act, the Endangered Species Act, and numerous other environmental and other laws that might be considered obstacles to the policy stated in Subpart 3. Laws that impose economic hardship also might fail this "consistency" test. In short, this provision will most likely be a constant source of litigation and dispute.

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This subpart also provides that consolidated grant money would have to be spent in furtherance of the programs and purposes of the consolidated grants, but Puerto Rico would determine "the proportion of the funds granted which shall be allocated to such programs and purposes." This could be interpreted to mean that Puerto Rico could use funds from one grant program to supplement funds from another.

The Department has numerous grant programs under which Puerto Rico receives funds. These include grants from the United States Geological Survey (USGS), the National Park Service (NPS), the United States Fish and Wildlife Service (FWS), and the Bureau of Mines. The FWS is particularly concerned about the impact on Pittman-Robinson wildlife restoration funds and Wallop-Breaux fish restoration funds that diversion under this subpart would allow because they are funded with user fee money and the hunters and fishermen have a keen interest in seeing that those fees are used for wildlife and fish restoration purposes.

In addition, under this subpart, Departments and agencies would be given the authority to waive the matching fund requirements of the law. Under current law, the Department of the Interior is required, and other agencies have the authority, to waive matching requirements for the territories, except that any matching requirement for under $200,000 must be waived by every agency. The existing matching waiver laws do not apply to Puerto Rico (48 U.S.C. 1469(a)).

Title IV, Subpart 13 of the legislation is unclear. It provides that the highest ranking Federal officer serving in Puerto Rico for any Department and agency, or division thereof, and "any other appointment in the Commonwealth of Puerto Rico subject to Senate confirmation" must be appointed by the President from a list of eligible candidates recommended by the Governor of Puerto Rico.

If this section only applies to Presidential appointees serving in Puerto Rico, it has no impact on this Department. However, if it applies to the highest ranking Federal officer serving in Puerto Rico for any agency, agencies such as the USGS, NPS, and FWS would be faced with a situation where district managers, park superintendents, or refuge managers would essentially be chosen by the Governor and not in accordance with standard personnel and professional practices. We understand that the Department of Justice also has serious constitutional concerns with this provision.

Subpart 18, provides that title to "all lands, buildings, and interests in lands, and other property now owned by the United States and within the territorial limits of the Commonwealth of Puerto Rico, and the harbor areas and navigable streams and bodies of water and submerged lands underlying the same in and around the island of Puerto Rico and the adjacent islands and waters, owned by the United States, which may have been acquired in Puerto Rico by the United States under the cession of Spain in the treaty of peace entered into on December 10, 1898, and the lands owned by the United States, and administered under the Caribbean National Forest, is hereby conveyed to the people of Puerto Rico and placed under the control of the Government of the Commonwealth of Puerto Rico".

Property managed by this Department that would be affected by this provision includes the San Juan Historic Site and the Culebra and Descheo units of the National Wildlife Refuge System. The San Juan Historic Site is listed on the World Heritage list of historic properties. The World Heritage Convention has treaty status and the United States is a signatory thereto. Under the treaty, we agree to protect the sites listed thereunder. While there are numerous sites on the list in private or non-Federal ownership (Monticello, for example), the unconditional transfer of the San Juan Historic

Site to Puerto Rico out of NPS management raises two concerns. The financial commitment necessary to ensure the site's complete protection may be greater than Puerto Rico is prepared to undertake (the FY 1990 budget for the site is $1,288,900 and 40 persons are employed at the site); and Puerto Rico's management policy may differ substantially from the National Park Service's policy of emphasizing resource preservation.

If the Committee believes that transfer of this area to Puerto Rico is a critical element of this title, such a transfer should be a phased conditional transfer of authority, combined with training and funding assistance.

We also point out that the Caribbean National Forest, which is specifically transferred by Subpart 18, is the habitat for the critically endangered Puerto Rican parrot, the most endangered free-living bird in North America. The FWS is working extensively with the Forest Service in efforts to protect and recover the species.

Finally, the language of Subpart 18 is unclear and confusing with respect to what offshore areas owned by the United States would be transferred to Puerto Rico under Commonwealth status. It easily could be read to transfer the 200 mile EEZ and its resources to Puerto Rico. The Department does not support such a transfer under commonwealth status and there is no precedence for the transfer. This provision should be written clearly and explicitly in order to avoid future litigation over the issue.

This concludes my testimony. I will be happy to answer any questions the Committee may have.

The **Chairman**. All right, Mr. Glidden, if you would hold it right there. I see Senator Simon who has come in. I know he has got to go to another hearing. If we could hear from Senator Simon at this point, then we will come back and finish your testimony.

Mr. **Glidden**. Certainly, Senator.

The **Chairman**. Senator Simon, it is always a pleasure to have you here, sir. A long-time friend of Puerto Rico.

STATEMENT OF HON. PAUL SIMON, U.S. SENATOR FROM ILLINOIS

Senator **Simon**. Thank you, Mr. Chairman. I thank you and Senator McClure for holding these hearings and for your leadership in this area. That really is extremely important. I think that plebiscite has to be provided. And frankly, I think we have to face the reality we cannot have 3.5 million Americans who are second-class citizens.

And commonwealth status, inevitably is—you can put it in any kind of form you want, but it is a form of colonialism; it is second-class citizenship. And the people of Puerto Rico are entitled to better than that.

I would like, Mr. Chairman, to read into the record if I could, a paragraph of a letter from former President Ronald Reagan to the former Governor of Puerto Rico, Luis Ferre:

> My beliefs toward Puerto Rico's statehood remain as they were while I was in office. I feel that Puerto Rican statehood would benefit both the people of Puerto Rico and their fellow American citizens in the 50 states, if the decision lies with the people of Puerto Rico and the United States, with no interference into the democratic process.

I think that is the case. I think there are just some very basic questions that the people of Puerto Rico have to ask. And from our perspective, Puerto Rico has earned the right to statehood. Puerto Rico has, in the Korean War, for example, Puerto Rico was second—if you were to put Puerto Rico as a state—second among all the states, in terms of wounded; third, in terms of people killed. Puerto Rico has contributed to every war in which we have been, in an above-average way, since Puerto Ricans have been American citizens.

Right now, Mr. Chairman, and my colleague from Wyoming, Senator Wallop, we are involved in a $157 billion bailout for savings and loans. It is very interesting in the Commonwealth of Puerto Rico, not one penny is going to be spent to bail out savings and loans, because they have operated things prudently in Puerto Rico.

It just seems to me that it is very clear that commonwealth status eventually is going to disappear. Because, whether you call it enhanced commonwealth status, which means enhanced second-class citizenship, or however you want to put it, the people of Puerto Rico will want to be first-class citizens. And that means either independence or statehood.

And I believe, both from the viewpoint of the people of Puerto Rico and the viewpoint of the people of the 50 states, statehood just makes a great deal of sense.

I have a formal statement I would like to enter into the record. I would be happy to answer any questions that you may have. But again, I want to commend both you—and I see Senator McClure, whom I just commended, coming in here right now. I want to commend you for your leadership.

I think the plebiscite is extremely important for the 50 states, for the 3.5 million people of Puerto Rico.

The CHAIRMAN. Thank you very much, Senator Simon. I appreciate your interest in this issue. I know you have been a long-time participant, and have been interested for a long time in Puerto Rican affairs.

As I think you know, as I have told you, my position is that I strongly believe that the people of Puerto Rico deserve the right of self-determination. They deserve self-determination before they deserve statehood or commonwealth or independence. They need to be able to choose. And I think you share that view, do you not?

Senator SIMON. Absolutely. There is just no question, the decision has to be theirs. But I think it is fair for us, because we are all American citizens, just as if you have a problem in Louisiana, I want to help, and I want to be of concern, when there are problems in Puerto Rico, we ought to be helping.

I have frankly done a great deal to be of some assistance to Puerto Rico. But my primary obligation is to the 12 million people in Illinois. They need two senators. They need six or seven House members.

The CHAIRMAN. Well, before we get into that, it seems that—first of all, as you know, my view is that I am for self-determination and I am not going to take a position between the three statuses, because I think that is for the people of Puerto Rico to decide.

Now, in order to be able to decide, we must fashion three choices that are fair, that are balanced, and, to use a phrase that the Administration used and did not follow, that is a level playing field. And I would hope that all of those, you and everyone else, and I know you will, who are interested in Puerto Rican affairs, would help us get that word out to the Senate and to the Congress that we want to put together a fair package and to support the package.

Now, after the package has passed the Congress, then that is time for the partisans to talk about statehood, commonwealth, independence, all of those things. But they will not get a chance to do that unless we can put together a fair package.

Senator SIMON. Absolutely.

The CHAIRMAN. And I hope you will help me encourage the Administration. The President has every right in the world to be for statehood. I do not discourage anyone for being for statehood. But I do not want him to use the Administration to try to skew the process. Because if he does, then the process may break down.

We have got to hold this process together. I cannot tell you how much respect I have for the leaders of the three parties who are working together, who are committed first, to Puerto Rico; second, to this process; and third, I think, to their own parties. I think I have the order of priority correct. I hope I do. I think I do. I think they have exhibited a loyalty to their island and to the process of self-determination. Because, after all, this is what this is about.

And if the people of Puerto Rico, after we have fashioned three adequate choices, if they want to be independent, if they want commonwealth, if they want statehood, I think we ought to give it to them. And that is what this self-determination process is all about.

Senator SIMON. Let me just agree with you. I happen to be, as I have stated, strongly in support of statehood. But strongly in support of statehood as I am, I want it to be a completely fair election there. I do not want it tilted in my direction, in the direction of statehood, or the direction of commonwealth, or the direction of independence.

And I have confidence in you and Senator McClure and the members of this committee that you are going to fashion precisely that. And we want the process to be a completely fair one for everyone.

The CHAIRMAN. Well, I appreciate that very much. And I know you will help us in the process. I mean, the word we want to get throughout the Congress is let us not think in terms of one of the three choices yet, but of all three choices and of self-determination as being the process; and to have everyone, the Administration, the Congress, work together. For example, on commonwealth, my philosophy on commonwealth is to give the maximum of self-government, or to use their word, autonomy, within the commonwealth status.

Now, that does not mean independence, and it really does not mean complete autonomy. But to the extent we can, we ought to grant all of those additional powers. For example, one of the things we ought to give is the power for them to challenge rules and regulations that do not make any sense for Puerto Rico, that are inconsistent with their culture, their economy, their climate, their habits, which do not require an overall national uniformity of policy. They ought to be able to challenge those and get an answer. Because sometimes the federal bureaucracy is very, very insensitive, as you well know.

Senator SIMON. We have experienced a little of that, yes.

The CHAIRMAN. We have, indeed, a little bit of that yesterday. So, we want to do that for commonwealth.

On statehood, we want to make the transition to statehood workable. We do not want to ruin the economy in the process.

On independence, precisely the same thing. I mean, we cannot say, okay, you can be independent, but we are going to guarantee—where was it, Mozambique, I think, that was given independence, but the colonial master took everything, including the toilets with them when they went—literally. And consequently, the economy of Mozambique absolutely collapsed. Now, whether it would have otherwise, you can argue about, but we will never know about Mozambique. We cannot do that with Puerto Rico.

We have got to give them, should they choose independence, an option that is workable, with the United States as a friend, as a helper—designing a system initially and then helping make it work. And the idea is, if they choose independence, to make it work. And we will want to do that. And I am sure you share that view?

Senator SIMON. Absolutely.

The CHAIRMAN. Senator McClure.

Senator McCLURE. Thank you very much, Mr. Chairman. Thank you, Senator, for your interest as well as your testimony here today, which are not unrelated facts.

We had testimony yesterday from the Department of the Treasury which indicated that they believe what we ought to do is give a rather broad, general choice to the people of Puerto Rico as to which of the statuses they would like to have; and then after that has been decided, work out the details.

Our position has been that we do not believe the people of Puerto Rico can make an informed choice unless we have worked out the details of each of the proposals before they are asked to vote on those proposals. Do you have a position in that regard?

Senator SIMON. Well, it does seem to me that there are some broad parameters that ought to be clear before that plebiscite is held. And I think what Senator Johnston has talked about is part of it—for example, section 936. I think section 936 is frankly going to go, whether it is statehood or commonwealth status or, obviously, independence it would go. But you have to work out a time schedule. You cannot just do it overnight, no matter what.

We had a proposal in here in the tax bill two years ago that would have just overnight gotten rid of section 936. I do not think that should happen. I think it ought to be gradually phased out, no matter whether it is commonwealth status or statehood status. I think those very practical things ought to be delineated.

Now, there are a lot of things, obviously, that are going to have to be negotiated after statehood. But just as you cannot give, I think, full benefits of statehood, just overnight, that is going to have to be phased in, because there are some very real costs involved. So the tax benefits that Puerto Rico has, I think will have to phased out gradually, too.

Senator McCLURE. Thank you very much for your statement.

The CHAIRMAN. Senator Simon, I have heard you make that statement before, that Section 936 under Commonwealth would be phased out. What basis do you have for saying that?

Senator SIMON. I just think the proposal was here two years ago or three years ago to do that. I think it is one of those things that——

The CHAIRMAN. It was soundly defeated.

Senator WALLOP. I must say, Mr. Chairman, as one who was on the Finance Committee at the time and strongly committed to its retention, I do not believe it is going to be phased out absent independence.

The CHAIRMAN. It seems to me that it has been extraordinarily successful. The history was that Munoz Marin came in and Puerto Rico was called, I think by Roosevelt, the poorhouse of the Caribbean and he put together Fomento, operation bootstrap.

It may not be a perfect system and I am not here to defend it in all its permutations, but it seems to me that that has been extraordinarily successful in bringing this island up to be the most economically successful island in all of the Caribbean basin by many orders of magnitude, and I do not think—I do not sense any overwhelming feeling in the Congress to do away with Section 936. Maybe to modify it, and what direction that would go in I do not know, but there is enormous effort that goes into changing that.

I saw that in the Administration's statement yesterday. That is the statement which I referred to in the Administration not having a level playing field, where they said something to the effect of, maybe the people of Puerto Rico should be told that 936 is going to be done away with.

Well, the President did not submit doing away with 936 as part of his budget. As bad as he needs revenue, he did not submit that. If he did, it could not pass, I do not believe. I just do not think—you know, I do not see the basis for saying that Section 936 cannot survive under commonwealth.

Senator SIMON. I recognize we are all just guessing as to what would happen, but I can remember when it was just taken for granted. No one even suggested the possibility that it should go, but there has been more talk. The Treasury Department, among our colleagues in the House—I am not on the Finance Committee, but talked not long ago with a member of the Ways and Means Committee who was talking along those lines. I do not know, but I think that the people of Puerto Rico should be aware that there is no certainty that 936 is going to be retained.

The CHAIRMAN. Absolutely. We understand the constitutional process, that Congress meets every year and we can do away with that. We can do away with the Civil Rights Acts, we can do away with the Yosemite National Park. It exists only as a congressional act.

All of that can go, but I think—I really do not think there is a basis for saying that there is some kind of inevitability that 936 is going to go, because I really do not believe that. Neither do I believe it, nor do I believe there is any real basis for saying that.

Modification perhaps, as we look at the efficiency with which it operates, whether the particular jobs it creates are too expensive, a whole host of those kinds of questions with fine-tuning that may, and probably will, take place along the way.

But it seems to me that there is no basis for saying that, and that is not just an idle question because companies that are thinking about going to Puerto Rico right now, under 936. If they thought it would not survive I do not think they would go there and we do not want to discourage that either.

Senator SIMON. I certainly do not want to discourage companies from going to Puerto Rico, but I think they are as aware as we are about the talk on 936, and in terms of companies—and I am less diplomatic than you are, Mr. Chairman, in terms of where I stand on this thing—but what a company clearly is interested in is what the future status is, and statehood would provide a stability that clearly would be a tremendous asset to industries investing in Puerto Rico.

The CHAIRMAN. I do not want to give the impression here of defending 936 so stalwartly that I am a partisan of commonwealth. There are very good arguments to make for each of the statuses and I am going to be prepared to make those. It is a very difficult role to play for me, frankly, to try to go down the middle of this road, because every time I say something—like 936—I overstate it. It is misinterpreted and the Puerto Rican press gets me from the other side.

So let me repeat, I am absolutely nonpartisan. But just as I said that I think Puerto Rican citizenship is indefeasible, is permanent under commonwealth, so I think 936 is perhaps not permanent, but I do not think it will be taken away. Modified, perhaps, but I think it will survive. Which is, again, not to say that this is the preferable status over statehood or independence. There are good arguments to be made on those.

Senator SIMON. You are doing a good job of walking through the middle there.

Senator McCLURE. I would like to commend the Chairman for his statement. I think 936 is certainly an issue that we will address as we go through this legislative process under each of the options. It must be treated under each of the options in one fashion or the other.

I would note only that I think citizenship has much more permanent status than 936, no matter what the permanence of 936 might be. Citizenship is permanent, and I recognize that we have the legal capacity to deal with so-called statutory citizenship in a different way than we do constitutional citizenship.

But under what I expect the Congress to do that is a technical difference but not a practical difference with very minor exceptions, if any. Citizenship is permanent, permanent, permanent, and 936 is something that over a period of time might change as economic conditions on the island change.

The CHAIRMAN. Senator Wallop is our resident member of the Finance Committee and can speak with some authority on that, or anything else he wishes to.

Senator WALLOP. Mr. Chairman, I would only observe that the argument over 936 is by some who view it with envy of the corporate status that it confers, other who view it with some sense of responsibility as to the economic development capability that it brings with it.

The only way of accomplishing the same thing is directly appropriating out of the Federal Treasury and that is neither good for Puerto Rico nor good for the citizens who pay taxes from Puerto Rico or from the rest of the country.

I just hope in our zeal to upset corporate apple carts we do not lose sight of the fact that there is a very real human economic development capability that this particular provision has been both cheap to provide and hugely successful in terms of its success.

One way or the other the responsibility remains. I think that is the basis of these hearings, is trying to work through a sense of responsibility in the democratic process to give people the ultimate choice in their own destiny. It is one of the considerations.

It is not likely that perhaps it would be the same kind of thing were independence to be, but clearly Puerto Rico as an independent nation would not part company from the United States with a Caribbean nation responsibility, in some ways, would remain.

I think Senator Johnston is doing a good job in trying to walk this line of not endorsing any prospects but defending certain concepts and I think this is one brought up as a symbol, and I think correctly brought up as a symbol, of one of the various multitude of issues that are going to have to be addressed in the process. Addressed they must be, but I think this is one of the least threatened in those addresses and I thank you for your endorsement.

Senator SIMON. I thank you and just to clarify one thing, Mr. Chairman. I have been a supporter of Section 936.

The CHAIRMAN. I thought you had.

Senator **Wallop**. If you were not, you probably are now.

Senator **Simon**. The reality is, you have the Treasury Department, you have some of our colleagues saying as we look about for revenue, this is one of the places we ought to be looking and I think the people of Puerto Rico ought to be aware of that.

But again, let me commend the three of you for taking an interest in this and it is—taking a look at the problems of Puerto Rico does not get you any votes in Louisiana or Idaho or Wyoming, but it is a great service to all the people of this Nation and it is of particular great service to the 3.5 million people of Puerto Rico and I am grateful to all three of you.

The **Chairman**. Thank you very much, Senator Simon. Mr. Glidden, if you would retake the hot seat there, I think we might get directly into questions here.

First of all, let me give my own view about the effect of this legislation on Guam and on other territories. Having been involved now for 17 years in territorial matters—Senator McClure has as well—we have been there at the borning of almost all of that legislation in the Pacific. There is a problem of precedent. What one island gets another will want.

However, we have not followed the precedents that closely and I do not feel, personally, that constrained about what we do in Puerto Rico as setting precedents elsewhere, because Puerto Rico is so different. When you take an island the size of Guam, just a few square miles, with a couple of hundred thousand people as I recall——

Mr. **Glidden**. 120,000, I believe.

The **Chairman**. Puerto Rico is just so dramatically different that we cannot be that concerned. If we have something we need to do with Puerto Rico, then we should do it without respect to whether it is going to be a precedent, because I personally will not feel bound by that precedent.

Now, with respect to the economic zone, is there any greater jurisdiction that we can give to Puerto Rico? I mean, we do not just have to go all the way to a 200-mile economic zone and give them 100 percent jurisdiction. We are certainly not prepared to do that—speaking for myself, I would not be prepared to do that.

Are there areas that we can surrender jurisdiction, or operational jurisdiction to Puerto Rico, on where the United States does not have any interest?

Mr. **Glidden**. There certainly is precedent, senator, for perhaps granting Puerto Rico certain rights over certain particular parts, such as the fish or minerals or whatever. You could break up what you granted to them between minerals and other economic values, and so I do not know that you necessarily have to say that it is either all or nothing. They have three marine leagues' worth of jurisdiction right now, as opposed to three miles. A marine league, the way I understand it, is a little bit over three miles.

The **Chairman**. Ten and a half.

Mr. **Glidden**. It is up to ten and a half, so clearly there is that precedent of giving them a larger amount, a larger distance than most states have. Although I believe your state has three marine leagues.

The **Chairman**. We have three miles. It is Texas.

Mr. GLIDDEN. The Commonwealth of the North.

The CHAIRMAN. We remember that in Louisiana.

Mr. GLIDDEN. Certainly there is that precedent then.

The CHAIRMAN. Will you do this: will you meet with the commonwealth people? I am asking them also to meet with you to explore what areas and also the statehood people, to see if there are some areas that we can give Puerto Rico additional rights.

You do not have to endorse the giving of those additional rights, necessarily. You can take the official position that we do not want to do this. But I would like to really know where those areas are that there is an overriding national interest.

We heard yesterday on tuna fishing, for example, that those are migratory fish and the only regime that works is an international regime. But if you would explore with them any areas where we can turn over some jurisdiction, that would be helpful.

Mr. GLIDDEN. Yes, we certainly would senator.

The CHAIRMAN. With respect to coastal barriers, as I understand it there are vast areas—there are important areas in Puerto Rico that would want to be developed. I think this pertains to both statehood and commonwealth, that unless you make an exception some coastal barriers could not be developed. Am I correct on that? Or, practically could not be developed because of federal loans, et cetera—would not be available?

Mr. GLIDDEN. I do not know that to be the case, but that argument has been made to us and I would venture to guess that they are correct in that.

The recommendations that were made by the Department of the Interior back in January of this year included 21,500 acres of land, 19,000 of which were wetlands and so this is a significant chunk of ground on an island and in informal discussions with the Governor's office and his representatives, they have indicated to me that this would be a significant hindrance to their plans for development on the island.

The CHAIRMAN. We need to have that examined, and sympathetically examined. We do not want to destroy the healthiest barrier reefs and fill in all the wetlands and all of that, but at the same time, with an island that has limited resources, one of the greatest resources is the beach areas for development for tourism. We do not want to ruin that potential for development if the values we want to protect under coastal barriers are not that great and we ought to reexamine that.

Mr. GLIDDEN. I might point out, Senator, I believe there is precedent for doing that. I believe the State of Louisiana was exempted from the entire Act at some point because it was determined by members of the Senate and the House that it did not qualify for the purposes of the Act.

The CHAIRMAN. I wish you would also take a look at that and I am inviting the commonwealth and the statehood people to meet with you to see if we cannot resolve that issue before we go to markup, because I am sure that this land—the development potential is very great and rather than us legislating on it, if we could have a resolution of that in advance it would be very, very helpful.

Mr. GLIDDEN. Yes, sir. We would be honored to do that.

The CHAIRMAN. Mr. Glidden, there have been points of irritation in the operation of, I know, El Morro, and the whole historic district, really. Have you got any advice on how we could avoid points of irritation?

I think you would oppose the transfer of title, transfer of operating authority to Puerto Rico under either statehood or certainly under commonwealth. Can you give us any advice on how we might deal with that issue?

Mr. GLIDDEN. Yes, sir. I think you probably put your finger right on the point there in that there are different things to talk about. There was title and then there was management, and then there is administrative control, and then there is funding of the operation of the site.

It costs a little over $1.2 million a year currently to run the site, which is a significant amount of money, I believe, and I am sure the Governor of Puerto Rico would be concerned about assuming that burden.

On the other hand, if you are just talking about title as opposed to management and administration and so forth, it is possible, if this committee were to deem it essential to the enactment of a fair piece of legislation, to sit down with those folks and discuss it.

However, the Interior Department would prefer to have a clean, clear indication of exactly how far you would like to go because this is a very sensitive matter. It is a world heritage site, and I think the United States Government is obligated under the provisions of that language to ensure that the site is maintained and is preserved and is not allowed to be turned into something other than its historic nature.

The CHAIRMAN. I know it is a very sensitive thing. As far as the Congress is concerned, we would not want—I think I can sense the way the Congress would go on this. We would not want to have the duty to pay all this money, and it is a lot more than just the $1.2 million.

We have already spent over $20 million in shoring up El Morro with the Corps of Engineers, and there is a long way to go on that, and certainly we want to do it. It is a world historic treasure. It is not just a national historic treasure. And everyone would want to do that, and the United States would not want to have the obligation of paying all the bills and not be able to have some say. But there ought to be a way to avoid points of irritation here.

Now, one way, I think, would be at least to have the appointment of the park director there to be made in consultation with the Governor of Puerto Rico, and perhaps we could go—well, I would like some variation on that theme so that there is a real consultation process so that the sensitivities of the people of Puerto Rico could not just be avoided or not listened to.

I am not saying that they ought to be able to open up a refinery on El Morro, but at the same time there ought to be a way to deal with that. Have you got any suggestions?

Mr. GLIDDEN. Well, the National Park Service has made various attempts to deal with what is a very delicate situation. The previous superintendent, the superintendent who is currently serving was a Puerto Rican, and that individual had a difficult time of it, and so some have argued that the individual who is the superintendent should be a Puerto Rican. And I do not know that that is necessarily the answer to the problem, but it might be the answer to the problem.

The difficulty would lie in when you had a change of administration. The question would be when a new governor, if a new governor is ever elected—I assume someday one will—will that new governor then replace the superintendent. I suppose that is possible. But it does bring into question exactly how you would work this if you were to replace the superintendent with each new administration.

The other difficulty would be as to exactly how the governor would select a superintendent.

The **Chairman.** We are not talking about their language where it gives to the governor in effect the right to submit a list from which the superintendent would be named. I think that would probably not be workable, but there ought to be something more, at least a consultation process, and something more than that, some dispute-settling arrangement so that the superintendent knows that he has got to be very, very sensitive to the requirements of Puerto Ricans in that he ought to bend in that direction and that there is some process by which they can resolve these disputes and be heard and be effectively heard.

Mr. **Glidden.** I think you are absolutely right, Senator. I think the government of Puerto Rico should have an opportunity to consult with and deal with the National Park Service and perhaps the Secretary of Interior in selecting these key individuals, and I think a dispute resolution mechanism needs to be set up under which, if the superintendent of the park down there and the local officials have a problem, that this can be worked out before the problem is escalated up to a level where people stop talking to each other simply because they feel that they cannot get anywhere.

But I do not know exactly what mechanism the committee would like to set up. It is a very complicated thing.

The other thing I wanted to add was the superintendent of a park is a fairly high level of individual in the National Park Service who needs a tremendous amount of experience and expertise, and it should be required that whoever is selected is selected from that rank of the National Park Service and that an individual is not brought in who has no experience at the very tricky and delicate job of managing a park that is located right in the middle, right surrounding San Juan.

It is an extremely complicated operation, as I am sure you detected when you were down there.

The **Chairman.** Of course, I can see that you would not necessarily need to bring in a superintendent from elsewhere. I can imagine that somebody who has been with the Park Service but is a lower rank in the Park Service might be better than someone who has spent his days managing a mountain park somewhere.

Let me ask that you also consult with the commonwealth group on trying to confect a dispute resolution procedure. From my standpoint, I would like to see it done on something less than a veto but something more than just the consultation. There ought to be a middle ground there so if they have a real dispute, they can require that it be heard.

Mr. **Glidden**. Yes, sir, we will do that.

The **Chairman**. Senator McClure.

Senator **McClure**. Mr. Chairman, I want to follow up on that last line of questioning because I am very much concerned about it.

I understand the attachment of the people of Puerto Rico to El Morro, but I have expressed before and must express again the fact that I am attached to it too, certainly not as personally and directly as the people who live in San Juan, but the Spanish heritage of this country is very, very great, and that is where it started.

The Spanish explorers went across the Southwest and as far north as up into the territory where I live. We have a great deal left of the Spanish heritage in our culture that had its wellsprings in the Spanish exploration and colonization of Puerto Rico and the other islands that are farther south and east than Idaho, but that is a part of the American heritage as much as Ellis Island and the Statue of Liberty or Constitution Hall in Philadelphia.

I do not see any likelihood that if it were proposed that we turn Constitution Hall over to the State of Pennsylvania that you would be sitting there saying well, we will think about it. I think we would get an automatic, almost total, reaction from you, would we not?

Mr. **Glidden**. Yes, you would, sir.

Senator **McClure**. There have been suggestions made that maybe we could transfer the title, and it does not seem to me to be that you have opposed that, yet let me ask you this question. Would you support transfer of title of the BLM lands to the State of Idaho?

Mr. **Glidden**. No, sir, I guess we would not.

Senator **McClure**. I think you would come unglued at the seams at such a proposal. I am a little bit puzzled to know why it is that with respect to these historic sites in Puerto Rico, you seem to be more tolerant of the idea of divesting the federal government of ownership.

Of course, in the event of independence, that is their business. We would be prepared to do so. But it seems to me that if you are talking of commonwealth and/or statehood, the United States has just as much interest in those historic sites located in that territory as we do of the various historic sites that we maintain around this country.

How would you feel about transfer of the Grand Canyon to the State of Arizona? We would just give them title. We will maintain management.

Mr. **Glidden**. We would be strongly against that, Senator.

Senator **McClure**. I suspect you would be heard from, and I say that because, while I understand the attachment of the people of Puerto Rico to these monuments and their interest in them, it is not singular. There are millions of Americans of Spanish heritage. There are many of us who do not have the ethnic Spanish heritage, but we cannot separate ourselves from the Spanish influence and Spanish cultural heritage of which we are a part. It is in our language, it is in many of our customs, it is deeply embedded in the history of our country, and I do not think we can separate ourselves from it.

I speak very strongly of that because I want people to understand. I believe—I have never had a more profoundly emotional experience than my first visit to El Morro even though I do not come from that area, and I am just as emotional about that as I am about Constitution Hall or Ellis Island or Manassas Battlefield or any of the other historic monuments that we have.

It is a part of my culture and a part of my heritage, and it is a part of the United States as a whole in my view.

I understand your concern about the coastal barrier system, but is it not a fact that no areas can be added other than by an act of Congress?

Mr. **Glidden**. That is correct, Senator. If this language were not in the bill, it would probably be a better way to do this because it is up to Congress to decide, and the Interior Department has simply recommended to Congress.

Senator **McClure**. But Congress will have to act one way or the other.

Mr. **Glidden**. That is correct, sir.

Senator **McClure**. The only difference is with respect to the responsibility for studies and reports?

Mr. **Glidden**. That is correct, sir.

Senator **McClure**. Is your opposition to the exclusion of Puerto Rico based on the resource value of the units solely or is it based on the economic costs to the United States Government?

Mr. **Glidden**. Well, I think the economic costs to the United States Government are a factor, but I do not believe they are the primary factor.

Senator **McClure**. I am a little bit struck by part of the testimony that we look at coastal barriers in terms of the costs saved rather than resources saved. I thought our concern about coastal barriers was the resource values.

Mr. **Glidden**. Yes, sir, that is my understanding. This is why I am saying I do not believe the costs saved are a significant factor in that position, sir.

As a matter of fact, that language was added just recently, and I do not know that it adds much to the testimony.

Senator **McClure**. I am not sure that it is really appropriate. It may signal the wrong set of values being applied.

I do not really think we save coastal barriers to avoid having to put in sewer treatment plants.

Mr. **Glidden**. I hope we do not, sir.

Senator **McClure**. You have indicated that the Caribbean National Forest habitat is habitat for a critically endangered species. You have expressed no view as to the advisability of the transfer of the forest.

Mr. **Glidden**. Well, although we do not administer the forest, it is my understanding that the position of the Agriculture Department is strongly against transfer.

Senator **McClure**. Do you share that?

Mr. **Glidden**. I would say we share that, yes, sir.

Senator **McClure**. Is that because of your responsibility under the Endangered Species Act or are there other factors?

Mr. **Glidden**. I think what I am reflecting is the opinion of the administration, sir. The Interior Department really has very little to do with administering or operating or anything else relating to that particular piece of ground, sir.

Senator McClure. Thank you very much, Mr. Chairman. I have no further questions at this time.

The Chairman. Senator Wallop.

Senator Wallop. Mr. Chairman, just a follow-up on Senator McClure's line of thinking.

Mr. Glidden, I have got to say that I am really dismayed by the department's testimony this morning. The administration whose president proposed this in the State of the Union message is now yawning and looking the other way while the committee goes to work. We saw it yesterday with Treasury, and we have seen it this morning with your testimony.

I think that the response of the Department of the Interior is totally irresponsible and not living up to the charges and challenges of its own obligations.

The idea that you would, without comment, let the transfer of title of national preservation and national historic sites and parks is just inconceivable to me, and I think it is inconceivable to you, given your responses to Senator McClure. And yet that is what you have come to do.

And I suspect the administration is looking in the sky hoping this will go the other way and will not be held accountable. But there are decisions to be made.

Senator Johnston is totally correct. The people of Puerto Rico, to make an informed choice, must know the consequences of each of those choices. Yet, the administration sits here and is totally unwilling to give any conscious effort to making and laying down the clear sides of each choice.

Where are you going to be? What are our national historic sites?

It strikes me that one of the things that you may have overlooked in all of this is that the United States has a treaty obligation, I think, do we not, to—what are you going to do with that obligation? Transfer it to the State of Puerto Rico? How would you do that under the international law?

Mr. Glidden. That is a very good question. I do not know how we would do that, and I would be against doing it. If this committee asked us to draft up a way to do it and felt that this piece of legislation was dependent on it, we would be willing to try, sir.

Senator Wallop. I think you just confirmed the characterization I made of the administration's position on this; that is, whatever the committee wants to do will not be the responsibility of the administration. You will just try to cooperate instead of joining this process. You are hoping that we stay on the tiger and ride it until it is tired, and we can get off and escape without it turning around and eating us, and hopefully it will have passed you by.

It is my hope that the administration does pay attention to this. Otherwise, it cannot be a useful process.

It is a difficult process under any set of circumstances, no matter how it is conceived. There are endless points that have to be addressed, and no matter how we do it, we will not address all of them. But for the administration to sit by and ignore something so significant as to whose treaty obligation, how can you transfer treaty obligations, you know. How would you just give away a nation's historic sites?

It just does not seem to me to be a very good idea to come down here and behave that way, and I am disappointed in that. That is all I have to say, Mr. Chairman.

The **CHAIRMAN**. Thank you very much, Senator Wallop.

Mr. Glidden, we have given you a good mandate to negotiate some things with both the commonwealth and the statehood group, and we hope you will do so and do so quickly because we are going to go into markup on this bill later this month. We thank you very much for your testimony.

Mr. **GLIDDEN**. Thank you, Senator.

The **CHAIRMAN**. Next we have a panel with Mr. Monserrate Flores, National Coordinator of the National Association for Puerto Rican Absentee Vote and Mr. Dennis Nieves, Association for Puerto Rican Absentee Vote of Brooklyn, New York.

Mr. Nieves should come to the table as well, and I understand you are accompanied by Reverend Ruben Diaz.

Welcome all of you, and please proceed, Mr. Flores.

STATEMENT OF MONSERRATE FLORES, NATIONAL COORDINATOR, NATIONAL ASSOCIATION FOR PUERTO RICAN ABSENTEE VOTE, ACCOMPANIED BY REV. RUBEN DIAZ

Mr. **FLORES**. Good morning, Senator Johnston, Senator McClure, committee members, all the staff and all participants.

My name is Monserrate Flores. I was born in the city of San German, Puerto Rico, and due to the lack of opportunities, on June 11, 1948 I left my hometown, and since then I have been a resident of the borough of the Bronx in New York City.

I am here to testify on behalf of the National Association for Puerto Rican Absent Vote. I am the national President, and we have chapters in several states and cities such as Illinois, New Jersey, Pennsylvania, Massachusetts, Florida, Louisiana, Washington, D.C., and many other cities. On behalf of all the organization's coordinators and volunteers and on behalf of the two and a half million Puerto Ricans residing in the United States, thanks to all of you for allowing us to make this presentation. I wish to state that this is a nonpartisan organization.

At the present time there about two and a half million Puerto Ricans living in the United States. However, it is understood that there are Puerto Ricans residing in every state of the union. We still have our families living in Puerto Rico. We travel to and from the island several times a year. Our roots are still in Puerto Rico. Most of us have property and businesses on the island, and our dream is to someday return and die in Puerto Rico.

Additionally, Puerto Ricans living in the United States are very much involved and concerned over all matters relating to the island. For example, the Puerto Rican community of the United States was instrumental in saving section 936, and every time there is a hurricane, flooding, or any type of catastrophe, we respond.

Many of us are deeply involved in the political process in Puerto Rico. The contribution of funds in the United States for the poor and/or for the ill in Puerto Rico continues to increase.

Therefore, on behalf of the National Association for Puerto Rican Absent Votes and on behalf of the two and a half million Puerto Ricans residing in the United States we respectfully request that proper legislation and guidelines including procedures be recommended by this committee and by the Senate of Puerto Rico and Congress of the United States of America allowing Puerto Ricans born in Puerto Rico and their children with residency in the United States the right to vote in the plebiscite being planned in Puerto Rico.

We strongly feel that we have the right to participate in the referendum that may decide the permanent political status of the island.

Furthermore, we strongly believe that the Congress of the United States and the Senate of Puerto Rico cannot afford to ignore the two and a half million Puerto Ricans living in the mainland.. By doing so, an injustice will be committed, and we, the Puerto Rican residents outside of Puerto Rico and the whole world will consider the plebiscite incomplete and very much unfair. Thank you.

The CHAIRMAN. Thank you very much.

Mr. Nieves.

STATEMENT OF DENNIS NIEVES, SPECIAL COUNSEL TO ASSEMBLYMAN CATAPANO OF THE 54TH ASSEMBLY DISTRICT IN BROOKLYN, NY

Mr. NIEVES. Mr. Chairman, good morning. My name is Dennis Nieves. I am special counsel to Assemblyman Catapano of the 54th assembly district in Brooklyn. I was born in Brooklyn, New York, of parents who were born in Puerto Rico and who emigrated to the United States.

On behalf of the Association for the Puerto Rican Absent Vote, I would like to take this opportunity to thank the members of the Congress and the Committee on Energy and Natural Resources for giving our organization the right to express our sentiment with regard to the future status of the island of Puerto Rico, where there is great concern among the members of our association that the Puerto Rican Americans residing here on the mainland, both the 1.3 million citizens who have emigrated to the United States and the 1.5 million like myself who were born in this country, that their voices will not be heard if we do not participate in this process.

The position of our association has been clear and consistent from the outset. It is not our position that we at this time support one of the three options available to those privileged to participate. It is our position that we are in existence to seek the same opportunity as those on the island and participate in the most important event to occur on our island in many years.

There will be many who believe that we should not have the right to participate because we do not reside on the island and therefore will not be affected by this potential change. But this argument is specious for it assumes that we do not have ties to the island nor have concerns for that island.

Our situation is unique because we are privileged at birth with citizenship and along with this privilege the right of free travel. It is but a small minority of Puerto Ricans who do not return to the island at some point in their life and many do, in fact, return permanently. And this fact is supported by the number of airline flights available and utilized by the Puerto Rican community.

The CHAIRMAN. Let me interrupt you at that point. We have read your statement. As far as the eligibility to vote, are you saying it should be limited to those born in Puerto Rico?

Mr. NIEVES. Absolutely not, sir. What I am saying is I, as American of Puerto Rican descent, I as a person who truly am concerned with the political status of the island of Puerto Rico, I who and my family who have given up our lives for this country and property for this country——

The CHAIRMAN. I am talking about the definition of who in the United States should be able to vote.

Mr. NIEVES. Well, sir, those who can show by proper documentation that they are of Puerto Rican heritage.

The CHAIRMAN. You mean born in Puerto Rico?

Mr. NIEVES. For instance, myself, sir, I can show my birth certificate, and it clearly states that my father was born on the island of Puerto Rico as well as my mother, and that should qualify me to be able to participate in this process.

The CHAIRMAN. Okay. Now, the first generation you are saying—you are saying that it should not be limited to those born in Puerto Rico?

Mr. NIEVES. No, sir.

The CHAIRMAN. But those born of parents—you mean both parents?

Mr. NIEVES. Not necessarily, sir. It could be one parent and also, sir, those who have a genuine interest in this political process. If one parent was born in Puerto Rico, that is fine. If one grandparent was born in Puerto Rico, that can be documented also, sir. And if that person wanted to participate, why should he not?

The CHAIRMAN. You say second generation. Suppose a third generation who is interested in Puerto Rico?

Mr. NIEVES. I am not quite certain if there are that many in that category, sir, but if there is a way to prove that fact, yes, sir, they should also be allowed to participate because they are Americans of Puerto Rican heritage.

The CHAIRMAN. I take it you are registered to vote in the United States?

Mr. NIEVES. That is correct, sir.

The CHAIRMAN. Let us say you have a third generation. What kind of proof will you have to bring?

Mr. NIEVES. I have thought of that question, sir, and my niece, for instance—my brother can give my niece his birth certificate and that birth certificate clearly states that my father was born on that island, and that should prove her heritage.

The CHAIRMAN. Actually we have—there is a dialogue committee of the three parties that has been meeting to try to resolve this issue. The committee has not met on the issue and has not agreed to necessarily accept what they would come up with, but I would expect that we would.

I think it would be difficult—it would not be impossible, maybe, for the Congress to allow extraterritorial voting certainly if all three parties wished it. It goes against the usual situation so strongly that if there is major objection from the three parties, you can understand it would be very difficult for us to grant that. All our desire is to have this to be a full and fair election properly conducted among those in Puerto Rico.

Now, if you wanted to go back to vote—say you wanted to vote in the next governor's election, what would you have to do to vote?

Mr. NIEVES. Well, sir, I would have to go back over there, satisfy residency requirements.

The CHAIRMAN. Is that 60 days?

Mr. NIEVES. I am not certain. I do not want to misquote the law—60 days—I see a nod by the ex-Governor of Puerto Rico, yes, sir.

[The prepared statement of Mr. Nieves follows:]

I WANT TO VOTE
PLEBISCITE
QUIERO VOTAR

TESTIMONY

PUBLIC HEARING ON REFERENDUM ON POLITICAL STATUS IN PUERTO RICO

Distinguished Committee Members:

My name is Dennis Nieves. I was born in Brooklyn, New York of parents born in Puerto Rico who emigrated to the United States.

On behalf of the National Association for Puerto Rican Absent Vote, I would like to take this opportunity to thank the Members of Congress and the Committee on Energy and National Resources for giving our organization the right to express our sentiment with regard to the future status of the island of Puerto Rico.

There has been great concern amongst the members of our association that Puerto Rican Americans residing here on the mainland, that being 1.3 million citizens who have emigrated to the United States, and also those like myself who were born in this country, which represents 1.5 million citizens, will not have their voices heard if they are not participants in this process.

The position of our association has been clear and consistent from the outset. It is not our position that we, at this time, support one of the three options available for those privileged to participate; it is our position that we are in existence to seek the same privilege as those on the island and participate in the most important event to occur on our island in many years.

There will be many who state that we should not have the right to participate because we do not reside on the island and therefore will not be effected by this potential change. But this argument is specious because it assumes that we do not have ties to the island. However, our situation is unique because we are privileged at birth with citizenship, and along with the privilege is the right to free travel. It is but a small minority of Puerto Ricans who do not return to the island, and many do return permanently. This fact is supported by the number of airline flights available and utilized by Puerto Ricans.

This unique privilege is a right not shared by most Americans whose ancestry and culture derive from other countries and from whom our government requires documentation in order to cross our borders; this is not the situation with Puerto Ricans. Members of this distinguished Committe, there are so many of us whom are proud of our heritage and whom are eager to assist in this important decision-making process.

We sincerely feel that we should have the right to vote because we also have contributed towards the pursuit of democracy and freedom for all. Many Puerto Ricans have died and were wounded as a result of war, some of those being members of my family.

Towards this end, our association has established numerous committees throughout the United States, seeking input as to whether the mainland Puerto Ricans have a desire to participate. The response has been overwhelming. We are confident that as a result of our efforts by means of radio and print - and I refer to five newspapers and seven radio stations - our message has reached close to a million citizens throughout various states who have expressed their desire to be heard.

In Brooklyn, whose committee is chaired by Mr. Reinaldo Caholo, in the short time that we have been bringing forth our message, he has received thousands of signatures from Puerto Rican Brooklynites who are concerned. This, distinguished members, is an outstanding accomplishment in light of the fact that Brooklyn, which is heavily populated by the Hispanic community, has but one Hispanic legislator in the borough.

Our association has, from the outset, communicated our sincere sentiment to our President, Mr. Bush, to the members of the Puerto Rican Senate, and specifically to the President of the Senate, the Honorable Miguel Hernandez Sanchez, who has responded in the affirmative that we should be allowed to participate, but that, however, this matter has been brought to the attention of the members of the Puerto Rican Senate and action is awaited by way of resolution to determine whether we will be given their blessing to participate.

Our association has also met with the Governor of Puerto Rico, the Honorable Rafael Hernandez Colon, who stated that he had a moral obligation to the absent Puerto Ricans that we would be allowed to participate. We thank Governor Hernandez Colon for taking the time to meet with our various committees throughout the United States and we are confident that he will pursue his obligation to have us vote. He has established a Committee on Dialogue to discuss our participation, however, we are concerned that the members of this committee are afraid of our participation because it is conceivable that we will ultimately be the ones to determine the status for Puerto Rico.

Upon information and belief, one of the political parties has taken an informal poll to see which status is favored by mainland Puerto Ricans. This particular party was concerned because the poll was not favorable towards their position. We ask that they do not use this informal poll to consider if we should vote because it does not accurately reflect the position of our people.

The next issue for your consideration is whom should be allowed to participate in this "status question." It is obvious that those who live in Puerto Rico will be allowed; this includes Non-Puerto Ricans who satisfy the residency requirement and I submit to you that these number over 200,000 individuals. It is further my understanding that, according to the Constitution of Puerto Rico, those incarcerated, including convicted felons, will also be allowed to participate. I ask this assembly, is this equitable, when individuals such as myself and many others similarly situated who have shown nothing but respect for the law, that we not be allowed to participate?

The next group are those born on the island, the 1.3 million who have emigrated to this country. It is alleged that they will be allowed to participate, however, nothing has been finalized nor put into writing. But what about me and the 1.5 million Americans of Puerto Rican descent who also want their voices heard? Why shouldn't we be allowed to express our sentiment and concern over the island of our forefathers? On a personal note, land which would have eventually been mine is owned by the United States Government. I am specifically referring to Ramey Air Force Base which was taken under eminent domain proceedings for the establishment of National Security in the region. My family and myself are proud Americans and did not seek to inhibit or protest this transfer of property.

It is my understanding that Poles in the United States spoke up for democracy in Poland by participating from our mainland in the recent elections. On June 3, 1989,the consulate building in New York City "was swarming with Poles and Polish-Americans eager to exercise their right to help secure Poland's political future." The Polish consulate said that "5,000 were registered to vote and scores of others were allowed to vote by simply showing a passport. By mid-afternoon, about 3,500 people cast ballots at polls that opened at 6 a.m." (The Daily News, Sunday, June 4, 1989). These individuals were allowed to participate in a democratic process. It is further my understanding that Latin Americans residing here in the United States are also allowed to participate in their countries' elections by mail. Why not us?

The last issue for your consideration is, how do we implement the vote if we are in fact granted the right to participate? The 1.3 million whom emigrated have birth certificates to prove that their birth took place on the island. With regard to the 1.5 million such as myself, our birth certificates clearly state that our parents or grandparents were born in Puerto Rico and that should be enough proof to show our cultural heritage.

There is already a process available to assist those similarly situated to have their absent vote counted. I refer to Puerto Ricans who are members of the Armed Forces and Government who are allowed to vote via mail, and we also seek to utilize this method as an alternative.

In conclusion, you preserve democracy by practicing democracy and allowing all of those who have a genuine interest and who will be affected to actively participate and have their voices heard. Thank you.

The CHAIRMAN. Senator McClure.

Senator McCLURE. I note in the statement that you make reference to the Polish election. I do not know what Poland's rules were, but I assume they are similar to ours; that is, if you are an American citizen temporarily residing abroad but maintaining a citizenship here, that you can vote in U.S. elections, and I assume the same thing would be true or may have been true with respect to the Polish citizens temporarily residing in the United States but maintaining their residence in Poland.

I am a little troubled by the suggestion which you have made that people of Puerto Rican heritage can vote regardless of their residence, legal residence, their voting residence. That is an entirely new principle which has never been applied to my knowledge in any other instance. Are you aware of any other instance?

Mr. NIEVES. No, sir.

Senator McCLURE. You were born in the United States. You are a registered voter here. You emigrated to the United States. Are you a registered voter in the United States?

Mr. FLORES. Yes, sir.

Senator McCLURE. Thank you. That is all the questions I have.

The CHAIRMAN. Thank you very much. You can understand the difficulties we would have. We look forward to hearing from the Dialogue Committee and they will help guide us at least in our initial deliberations on this issue. Thank you very much.

Finally, this morning we have a panel composed of Mr. Luis Acle, Jr. and the Honorable John H. Buchanan, Jr., Chairman of the People for the American Way Action Fund and former member of the House of Representatives. Mr. Acle, if you would begin please?

STATEMENT OF LUIS ACLE, U.S. ENGLISH

Mr. ACLE. Thank you very much, Mr. Chairman. U.S. English is pleased to accept your invitation to attend this hearing and offer testimony on behalf of our 350,000 members regarding language policy in Puerto Rico as a State in the Union. Our testimony today only addresses language policy as it relates to statehood status for Puerto Rico, not commonwealth or independent status.

U.S. English believes that a common language benefits a country and its people. Our goals are twofold: to declare English the official language of government in the United States and to guarantee the opportunity to learn English to every person in America.

Our organization does not intend to limit the private use of any language, and for a moment, Mr. Chairman, I would like to emphasize that point, because there is a bit of a misconception that indeed our organization would like to preclude the use of other languages for commercial purposes, or cultural purposes, or religious purposes, or educational purposes.

This is not the case. We are primarily interested in making sure that English is the language of government in its official functions and we have no intentions whatsoever to limit the use of any other, private use of any other language. We believe, however, that English is our common language and should be the language of government.

U.S. English considers all cultures and languages represented in the United States as precious resources. We believe our Nation is richer because of the contributions made by the linguistic and culturally diverse groups present in our society.

The question about languages has nothing to do with one versus another. In our opinion, it has to do with one language versus many. In very practical terms, Mr. Chairman, our government functions organizationally as a pyramid, designed to ensure consistency and fairness.

Most of the departments of the Executive Branch have regional offices reporting to Washington and they in turn have district offices that report to them.

The same is true of the Judicial Branch. Federal courts are organized by districts and they are subject to the jurisdiction of the appellate courts and eventually to that of the Supreme Court.

But there is a more compelling reason for government to function in one language. Our democratic form of government is based on the consent of the governed. We, the people, elect our leaders and give them power and legal authority to legislate and set national policies.

We thus make a voluntary commitment to obey the laws of our land because they were authored by the legislators we chose and enforced by the President we elected. Effective, unambiguous communication between the people and their government is fundamental.

Granted, government can choose to perform some of its functions in languages other than English. This, in fact, is happening today to provide access. But attempts, no matter how well intentioned, to provide access by setting up parallel systems of government in other languages would not constitute true access.

We know that English, besides being the language of government, is the language of social, political and economic opportunity. This is true not only in the United States but increasingly around the world, and so we offer English to new immigrants and new citizens as a key to success in the world as well as in the United States.

Not knowing English in the United States——

The CHAIRMAN. Excuse me, just a minute. Let me—may we have order in the room, please? Please proceed.

Mr. ACLE. Not knowing English in the United States enslaves you to persons who do and creates a class of citizens dependent on others. The United States stands for political freedom, individual rights and participative democracy, not for a two-tiered system.

Now, during these historical debates we feel it would be badly misleading for the people of Puerto Rico to vote in the plebiscite thinking that any language other than English can be the official language of a State in the Union.

English is the common language of the people of the United States and one day it will be given added recognition as the official language of government in this country. At that time we believe that Puerto Rico as well as other states will follow the laws of the land and accept English as the official language of government.

Mr. Chairman, we recognize the historic and cultural significant role the Spanish language has served in Puerto Rico. We are quite aware of the substantial effort that would have to be made to equip the citizenry of a new state to function in English by offering sustained instruction for children, adults in the work place and even retired adults, so that all can deal with the government in English after a reasonable period of transition.

U.S. English recognizes that if Puerto Rico should become a state, the people of Puerto Rico will retain a valuable linguistic cultural advantage with respect to U.S. trade with other nations in the Caribbean and elsewhere in Latin America, but we would emphasize that this advantage is even greater for those who also speak English. We believe that in due time, those who have mastered the English language will be rewarded in the marketplace with the best jobs and the higher incomes.

By contrast, Mr. Chairman, I would urge you to consider the negative effect of leaving the matter of language in a cloud of ambiguity. Any hesitation to openly address the issue of language of government could be interpreted as a lack of sincerity or responsibility on the part of the Congress.

The Federal Government in Puerto Rico functions in English and it will continue to function in English. Therefore, any discussion of the issue of statehood must include a recognition that English is essential.

The observation made by friends and members of U.S. English who have traveled to Latin America is that parents, teachers and the students themselves are convinced of the advantage of having English and are eager to learn it quickly. They view it as an investment, and correctly so.

However, as all investments, it is an intelligent one only if it has future value. Mr. Chairman, I believe you are now able to make a strong statement to emphasize the future value of English to the youth of Puerto Rico by making it clear that government will eventually function in English.

In conclusion, Mr. Chairman, U.S. English and its members would like to ensure that if the people of Puerto Rico decide in favor of statehood, we would want the Union to receive the new state without any handicaps or restrictions that would limit it in any way.

Puerto Rico has many advantages, including geographical location, access to markets, availability of natural resources, et cetera, but its ability to attract major private industry to set up operations for manufacturing or distribution, or research and development, would be severely limited if English-speaking organizations do not have the assurances that they would not be penalized for functioning only in English.

We believe this is the time to make clear an unequivocal position that the new state will move towards the direction of full proficiency in English, thus eliminating any concerns that might prevent anyone from establishing operations in the island.

In the final analysis, we believe this policy statement on language will have positive effects.

[The prepared statement of Mr. Acle follows:]

Embargoed for release:
10 A.M. Friday, July 14, 1989

TESTIMONY OF U.S.ENGLISH
PRESENTED BY LUIS ACLE

BEFORE

THE UNITED STATES SENATE

COMMITTEE ON ENERGY AND NATURAL RESOURCES

S.712

JULY 14, 1989

Mr. Chairman, U.S.ENGLISH is pleased to accept your invitation to attend this hearing and offer testimony on behalf of our 350,000 members regarding the language policy of Puerto Rico, as a State in the Union. Our testimony today only addresses language policy as it relates to statehood status for Puerto Rico, not commonwealth or independent status.

U.S.ENGLISH believes that a common language benefits a country and its people. Our goals are twofold: to declare English the official language of government in the United States; and to guarantee the opportunity to learn English to every person in America. Our organization does not intend to limit the private use of any language. We believe, however, that English, as our common language, should be the language of government.

U.S.ENGLISH considers all cultures and languages represented in the United States as precious resources. We believe our nation is richer because of the contributions made by the linguistic and culturally diverse groups present in our society.

The primary question about languages has nothing to do with one language versus another. It has to do with one language versus many.

In very practical terms, our government functions organizationally as a pyramid, designed to ensure consistency and fairness. Most of the departments of the Executive Branch have regional offices reporting to Washington, and, they in turn have district offices that report to them. The same is true of the

Judicial Branch. Federal Courts are organized by districts and they are subject to the jurisdiction of appellate courts and eventually to that of the Supreme Court.

These organizational hierarchies require that all people at one level be able to communicate with those at another. Unless everyone at all levels is multi-lingual, we must share one language in common.

In truth, a shared language means more efficient, less costly, more effective, and more precise communication among us all.

But there is a more compelling reason for government to function in one language: our democratic form of government is based on consent of the governed. We, the people, elect our leaders and give them power and legal authority to legislate and set national policies. We thus make a voluntary commitment to obey the laws of the land, because they were authored by the legislators we chose, and are enforced by the President we elected. Effective, unambiguous communication between the people and their government is fundamental.

Granted, government can choose to perform some of its functions in languages other than English. This, in fact, is happening today to provide access. But attempts, no matter how well-intentioned, to provide access by setting up parallel systems of government in other languages is not true access.

We know that English, besides being the language of government, is the language of social, political, and economic opportunity. This is true not only in the United States, but increasingly around the world. And so we offer English to new immigrants and new citizens as a key to success in the world as well as in the United States. Not knowing English in the U.S. enslaves you to persons who do, and creates a class of citizens dependent on others. The United States stands for political freedom, individual rights, and participative democracy, not for a two-tiered society.

Now, during these historical debates, we feel it would be badly misleading for the people of Puerto Rico to vote in the plebiscite thinking that any language, other than English, can be the official language of a state in the Union.

English is the common language of the people of the United States, and one day will be recognized as the official language of government in this country. At that time, we believe that Puerto Rico, as all other states, will follow the laws of the land and accept English as the official language of government.

We would warmly welcome Puerto Rico as a state if its people so chose. Furthermore, we recognize the historic and culturally significant role the Spanish language has served in Puerto Rico. We are quite aware that substantial effort would have to be made to equip the citizenry of the new State to function in English by offering sustained instruction for children, adults in the workplace, and even retired adults so that all can deal with the government in English after a reasonable period of transition.

Mr. Chairman, we believe this Committee and the U. S. Congress have an opportunity to make a unique symbolic statement that will be of enormous benefit to the people of Puerto Rico, with whom we already share U. S. citizenship. This benefit will accrue to them regardless of the outcome of the plebiscite that will take place in the future. By emphasizing the necessity of the federal government to function in English, you would be sending a strong sign of encouragement, especially to the youth, that they should begin or continue their effort to learn and perfect their use of the English language. It would make clear that by doing so, they are no less entitled to use Spanish or any less to be Puerto Ricans. By learning English they become richer. They don't give up anything in the process.

U.S.ENGLISH recognizes that if Puerto Rico should become a State, the people of Puerto Rico will retain a valuable linguistic and cultural advantage with respect to U. S. trade with nations in the Caribbean and elsewhere in Latin America. But we would also emphasize that this advantage is even greater for those who also speak English. We believe that in due time, those who have mastered the English language will be rewarded in the market place with the best jobs and the higher incomes.

By contrast, Mr. Chairman, I would urge you to consider the negative effect of leaving the matter of language in a cloud of ambiguity. Any hesitation to openly address the issue of the language of government, could be interpreted as a lack of sincerity and responsibility on the part of the Congress. The federal government in Puerto Rico functions in English, and will continue to do so. Therefore, any discussion on the issue of statehood, must include a recognition that English is essential.

The observation made by friends and members of U.S.ENGLISH who have traveled in Latin America is that parents, teachers, and the students themselves are convinced of the advantage of having English and are eager to learn it quickly. They view it as an investment, and rightly so. However, as all investments, it is an intelligent one only if it has future value. Mr. Chairman, I believe you are now able to make a strong statement to emphasize the future value of English to the youth of Puerto Rico by making it clear that government will function in English.

In conclusion, Mr. Chairman, U.S.ENGLISH and its members would like to ensure that if the people of Puerto Rico decide in favor of statehood, we would want the Union to receive the new state without any handicaps or restrictions that would limit it in any way. Puerto Rico has many advantages, including geographical location, access to markets, availability of natural resources, etc. But its ability to attract major operations for manufacturing, distribution or research and development could be severely limited if English speaking organizations do not have assurances that they will not be penalized for functioning only in English. We believe this is the time to take a clear and unequivocal position that the new State will move towards the direction of full proficiency in English, thus eliminating any concerns that might prevent organizations from establishing operations on the Island. In the final analysis, we believe this policy statement on language will have a positive effect.

Finally, Mr. Chairman, I would reiterate the desire U.S.ENGLISH has in promoting the acquisition of other languages. We believe our population is better off if we are equipped and able to speak foreign languages. We will continue to encourage foreign language instruction. We believe one logical result of a favorable vote on statehood would be an increase in the level of interest by our English speaking citizens to learn Spanish. Not only do we not object, we actively support this idea, as long as it is *in addition* to English and not *instead of* English.

TESTIMONY

of

GERDA BIKALES

FOUNDING MEMBER
U.S.ENGLISH BOARD OF DIRECTORS

To the testimony presented today by Mr. Acle, I would like to add the following:

In fairness to the people of Puerto Rico, voters in any plebiscite on the status of Puerto Rico should know that statehood implies a transition to English as the official language of government, with provisions for the due recognition and accommodation of the traditional role of Spanish in Puerto Rican culture.

It is encumbent upon Congress to be explicit with regard to language policy in its enabling legislation.

Any plebiscite that does not adddress the language consequences of statehood can not be binding on the American people -- nor, to be fair, on the people of Puerto Rico.

Thank you for the opportunity to clarify this point.

U.S.ENGLISH

ENGLISH FIRST

OUR SYMBOL IS THE STATUE OF LIBERTY TORCH CAPTURING THE SPIRIT OF IMMIGRANTS WHO LEARNED ENGLISH AND BECAME FULL MEMBERS OF AMERICAN SOCIETY

TESTIMONY OF ENGLISH FIRST
SUBMITTED TO
THE SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES

S. 710, S. 711, S. 712
REFERENDUM ON THE POLITICAL STATUS OF PUERTO RICO

WASHINGTON, D.C.
JUNE 1989

8001 FORBES PLACE, SUITE 102, SPRINGFIELD, VIRGINIA 22151 (703) 321-8818

The Senate Committee on Energy and the Environment is holding hearings on three bills each of which would permit a referendum on the political status of Puerto Rico. The bills are S. 710, S. 711 and S. 712. They call for the people of Puerto Rico to choose between statehood, enhanced commonwealth status or independence.

English First believes that all the bills fail to address an essential issue: language policy. S. 710 may look reasonable but this appearance is attained because it does not address any of the controversial issues involved in the three choices to be put before the people. Instead, it would allow for these essential details to be resolved after the referendum. These matters would then be either accepted or rejected by the people in a second referendum.

S. 711 and S. 712 attempt to answer some of these questions in more detail, but both fail to fully recognize the importance of an appropriate language policy. This issue must be resolved prior to any of the proposed referendums even though it is a controversial one.

Should the committee send a bill to the floor which does not fully address the language question, but does address every other question, then the people of Puerto Rico would have every right to be deeply offended. To evade this issue is to imply that the Puerto Rican people will not make the "right" decision if they are given all the information.

The fact is that both the United States and Puerto Rico have an interest in the type of statehood or commonwealth about which the people will be voting. Both have interests that must be recognized and fully understood by the other.

In the case of independence, Puerto Rican domestic language policy would be of no concern to the United States. If there is to be a language policy between the two sovereign nations, then it must be evaluated by them on an equal footing.

With respect to statehood, it must be observed that every state to enter the Union has done so when the notion that the U.S. was an English-speaking nation was not in dispute.

For example, the Louisiana Constitution accepted by the Congress upon that state's admission clearly set forth that "All laws that may be passed by the [state] Legislature, and the public records of this State, and the judicial and legislative written proceedings of the same, shall be promulgated, preserved and conducted in the language in which the constitution of the United States is written."

Today, however, we are not so unified on our national language policy. Both statutes and judicial rulings have imposed bilingual language policies upon the states. In fact, many states are under an obligation to provide services in two or more languages.

As a result, if a version of S. 711 or S. 712 were to be passed, then the language question involved in the statehood and enhanced commonwealth options should be clearly set forth. This is the only way that the people of Puerto Rico would be able to make an intelligent and fully-informed choice when they vote.

The fact is that although the melting pot concept is under fire, it has been remarkably successful. It has helped establish "one nation out of many." The United States has benefited from the participation of many nations in the formation of what is a uniquely American culture.

So far, every state admitted to the Union has ultimately ensured a "more perfect Union" by either implicitly or explicitly recognizing the English-language basis of American society. That "more perfect Union" cannot be achieved if the language question is only half-answered or ignored in the case of Puerto Rico.

We need only look to our northern neighbor to see the divisiveness that a policy of official bilingualism causes.

The Canadian federal government has established a controversial policy of bilingualism in an effort to bring unity to a nation divided along language lines. The success of this policy is at best open to interpretation. The United States and Puerto Rico would be foolish not to resolve the language issue when they are able to freely choose the manner of their association.

English First urges the Committee to consider the following suggestions with respect to the statehood or enhanced commonwealth options, as appropriate:

1. The federal and state governments must never be under an obligation to use any language other than English as the result of statehood or enhanced commonwealth status for Puerto Rico;

2. The English-language basis of the culture of the United States as a whole should be respected and promoted;

3. Prospective states whose main languages are other than English should be permitted to continue their current policies with respect to those languages;

4. The rights of English-speaking Americans must be respected in and by Puerto Rico should it become a state;

5. Citizens of the state of Puerto Rico may not impose the use of their native language upon the federal or state governments;

6. Puerto Rico will not prevent or hinder its citizens from learning English and should promote English language acquisition should it become a state;

7. Puerto Rico must not compel its citizens to use a language other than English and should allow them every opportunity to be served in English if that is their choice.

In sum, English First believes that it is in the interest of both the United States and Puerto Rico to recognize the common language of the Union, particularly with respect to the statehood option. If S. 711 or S. 712 are going to meaningfully address the different choices presented, then language policy must be fully and responsibly disclosed beforehand.

The inherent flaw of these two bills is that neither fully addresses the rights of the United States or of the various states regarding language. The people of Puerto Rico have the right to know that if they choose statehood or enhanced commonwealth status, they are choosing a relationship with an English-speaking nation. Puerto Rico's statehood should be on an equal footing as that of every other state which has had to address similar issues of language and culture.

English First greatly appreciates the opportunity to express its views on the issues in question.

Respectfully submitted,

P. George Tryfiates
Executive Director

The CHAIRMAN. Thank you very much.

Mr. Buchanan?

STATEMENT OF JOHN H. BUCHANAN, JR., CHAIRMAN, PEOPLE FOR THE AMERICAN WAY ACTION FUND

Mr. BUCHANAN. Mr. Chairman, Senator McClure, I speak today on behalf of People for the American Way Action Fund, some 275,000 American citizens who comprise a nonpartisan, constitutional liberties organization.

I too wish to speak, but quite differently, on the subject of language policy in Puerto Rico. We support the calling for a referendum and commend the Committee for the action you are now undertaking. We take no position on which of the three forms of government.

The CHAIRMAN. Thank you very much.

Mr. BUCHANAN. We agree with you, Mr. Chairman, that political self-determination is the bedrock of our democratic tradition and it is up to the citizens of Puerto Rico to make the choice and they will honor that tradition in so doing.

But the American people do favor self-determination for Puerto Rico. In a Gallup Poll in 1982, some 59 percent of Americans favored granting Puerto Rican statehood if that is what the Puerto Ricans desired. Some 67 percent favored independence, if that is what the majority of Puerto Ricans want.

The legislation before you includes the provision that if statehood is chosen, Spanish and English will remain the official languages. Spanish and English are guaranteed their legal status through the preamble to the Puerto Rican Constitution and the statutes of Puerto Rico. We support the continuation of that policy because we believe the choice of language is integral to personal and political self-determination.

Now, there is a movement in the United States, prompted by U.S. English among others, to declare English the official language. We believe that movement is at best unnecessary. English is spoken by almost all Americans, and English language instruction classes for new immigrants are overflowing.

At worst, the English-only movement is one of the latest manifestations in a long history of discrimination against newcomers. An example of the negative effect of English only occurred in Monterey Park, California, where the City Council ousted the Library Board primarily because the library had too many books that were foreign language books on the shelves. People For the American Way secured pro bono counsel for that Library Board and fortunately the California Court of Appeals recently directed its reinstatement.

During the dark chapters in our history as a Nation, we sometimes pursued morally untenable and culturally demeaning policies such as slavery, Jim Crow laws, the internment of Japanese-Americans and the suppression of Native-Americans.

With respect to the English language, the United States also required four states, including your State of Louisiana, Mr. Chairman, to adopt English as the language of government and education as a condition of statehood.

The suppression of native languages was a mistake of a different era that we should not repeat today. While the policies were undertaken with good intentions, the effect was devastating. The victims of the policies were shamelessly stigmatized as un-American, unpatriotic or unworthy of equality.

In recent years, some states have remedied their earlier suppression of native languages. Louisiana passed a law in 1974 upholding the right to preserve and promote minority languages and cultures. Hawaii amended its constitution in 1978 to establish native Hawaiian as co-equal to English as an official language.

New Mexico, one of the states required to give up Spanish upon statehood, voted this year "to recognize that for survival in the 21st Century, our country needs both the preservation of the cultures and languages among us and the fostering of proficiency in other languages on the part of its citizens."

We believe this trend to be a commendable one and it places deserved value on maintaining our diverse and pluralistic cultural heritage.

Puerto Rico has a 500-year history of Spanish culture and language. It did not come as a result of westward expansion, of course, but because of the Spanish-American War.

In Puerto Rico studies have suggested that 98 percent of the population speaks Spanish but 20 percent are fluent in English and in addition to those who fluently write and read English, the vast majority understand English and English enjoys a high visibility.

These hearings conducted in English are being broadcast live to Puerto Rico and they are being watched with great interest and are the subject of much discussion there.

The United States Government in 1904 mandated the use of English as the language of education and that requirement eventually led to an 80 percent dropout rate in the schools. The imposed foreign language made education meaningless.

Over the years, Spanish returned to the medium of education with English available as a principal subject. At present, students are given 11 years of English language instruction in Puerto Rican schools and therefore there is a an ever-growing bilingual population.

Puerto Ricans also acquire English by reading English language newspapers, television and radio broadcasts and by frequent travel to the continental United States.

The Puerto Rican people value their bond with the American mainland, not separateness. In fact, I would hold Puerto Rico up as a remarkable role model to the rest of the United States. Over 80 percent of the eligible voters regularly go to the polls to participate in the electoral process.

Citizen participation on the mainland stands in stunning comparison. The embarrassing low turnout on the mainland of the United States elections is 50 percent or less. That has become a habit here.

If statehood is selected in the referendum, that is even clearer evidence that Puerto Ricans want to enhance the political and cultural relationship with the United States. They understand greater use of English would result, but there should be no language requirement as a condition of statehood. This would undermine the rich cultural history and diversity of Puerto Rico.

Puerto Rico's cultural heritage and diversity are tremendous assets of the United States and respectful, and demonstrates to the world that we honor, not scorn, the unique cultural qualities of our people. Cultural diversity, which I would say is acceptance and inclusion of people with different entities and traditions, is perhaps the finest concept derived from the Bill of Rights protections. We are not just a melting pot, we are a rich mosaic of the world's peoples and cultures and faiths.

As you said earlier, Mr. Chairman, we must let Puerto Rico be Puerto Rico.

[The prepared statement of Mr. Buchanan follows:]

People For The American Way
ACTION FUND

TESTIMONY OF THE HONORABLE JOHN H. BUCHANAN, JR.

Chairman, People For the American Way Action Fund

on S. 711 and S. 712

before the

Committee on Energy and Natural Resources
United States Senate

July 14, 1989

Good morning, Mr. Chairman and members of the Committee. I am John Buchanan, Chairman of People For the American Way Action Fund, a nonpartisan, constitutional liberties organization of 275,000 members. I am honored to speak to you today on the issue of language policy in Puerto Rico as you consider the future political status for the commonwealth.

People For Action Fund supports the calling of a referendum on the political status of Puerto Rico but we take no position on which of the three forms of government -- enhanced commonwealth, statehood or independence -- should be selected by the citizens of Puerto Rico. Political self-determination is the bedrock of our democratic tradition. The citizens of Puerto Rico will serve that heritage honorably by voting on their future political status. In recent months, the quest for democracy in China and the Eastern bloc reminds us all that self-determination is a goal of people across the globe. Furthermore, Americans favor political self-determination for Puerto Ricans: a Gallup poll released in 1982 found that 59% of Americans would favor granting Puerto Rico statehood if that is what the Puerto Ricans desired, and 67% favored independence if that is what the majority of Puerto Ricans want.

The legislation calling for a referendum and delineating the specific changes in Puerto Rico's political status, S. 711 and S. 712, includes the provision that if statehood is chosen, Spanish and English will remain the official languages. Spanish and English are guaranteed this legal status through the preamble to the Puerto Rican Constitution and the statutes of Puerto Rico. People For Action Fund supports the continuation of this policy, because we believe that the choice of language is integral to personal and political self-determination.

There is a movement in the United States, prompted by U.S. English among others, to declare English the official language. We believe that this movement, at best, is unnecessary -- because English is spoken by almost all Americans and English language instruction classes for new immigrants are overflowing. At worst, the English-only movement is one of the latest manifestations in a long history of nativism and discrimination against newcomers. An example of the negative effect of the English-only policy occurred in Monterey Park, California, where the City Council ousted the Library Board primarily because too many foreign language books were on the shelves. People For the American Way secured pro bono counsel for the Library Board and, fortunately, the California Court of Appeals recently directed its reinstatement.

During the dark chapters in our history as a nation, we sometimes pursued morally untenable and culturally demeaning policies such as slavery, Jim Crow laws, the internment of Japanese-Americans and the suppression of Native Americans. With respect to the English language, the United States also required four states to adopt English as the language of government and education as a condition of statehood. The suppression of native languages was a mistake of a different era that should not be repeated today. The policies were undertaken with good intentions, but the effect was devastating. The victims of the policies were shamelessly stigmatized as un-American, unpatriotic, or unworthy of equality. In recent years, some states have remedied their earlier suppression of native languages: Louisiana passed a law in 1974 which upholds the rights to preserve and promote minority languages and cultures; Hawaii amended its Constitution in 1978 to establish Native Hawaiian as coequal to English as an official language; and New Mexico, one of the states required to give up Spanish upon statehood, voted this year to "recognize that for survival in the twenty-first century our country needs both the preservation of the cultures and languages among us and the fostering of proficiency in other languages on the part of its citizens." This trend is a commendable one and places deserved value on maintaining our cultural heritage.

Puerto Rico has a 500-year history of Spanish culture and language. It became a United States possession as a result of the Spanish-American War, not because it is part of the continental land mass that experienced the national expansion westward. In the 90-year political association between Puerto

Rico and the United States, both have benefitted: for example, the national security interests of the United States have been furthered in the Caribbean and Puerto Rico's economy has grown from mainland investment in the island.

In Puerto Rico, studies have suggested that 98% of the population speaks Spanish and 20% are fluent in English. But in addition to those who fluently read and write English, the vast majority understand English and English enjoys a high visibility. These hearings, conducted in English, are being broadcast live to Puerto Rico where they are being watched with great interest and are the subject of much discussion. The United States government mandated the use of English as the language of education in 1904. That requirement eventually led to an 80% dropout rate in the schools. The imposed foreign language made education meaningless. Over the years, Spanish returned as the medium of education, with English available as a principal subject in the curriculum. Currently, student are given eleven years of English language instruction in Puerto Rican schools, which has resulted in an ever-growing bilingual population. Puerto Ricans also acquire English through the many English language newspapers, television and radio broadcasts, and by frequent travel to the continental United States.

Puerto Rican statehood has been under discussion for several decades. Clearly, the Puerto Rican people value their bond with the American mainland -- not separateness. Puerto Rico, in fact, is a remarkable role model in citizen participation -- over 80% of the eligible voters regularly go to the polls to participate in the electoral process. This is in stunning comparison to the embarrassing low turnout in mainland United States elections, where 50% or less participation rate has become standard.

If statehood is selected in the referendum, that is even clearer evidence that Puerto Ricans want to enhance the political and cultural relationship with the United States. They understand that greater use of English would result. But there should be no language requirement as a condition of statehood. That would undermine the rich cultural history and diversity of Puerto Rico. Respect for Puerto Rico's cultural heritage and diversity is a tremendous asset of the United States, and demonstrates to the world that we honor, not scorn, the unique cultural qualities of our people. Cultural diversity, which I would define as the acceptance of people with different identities and traditions, is perhaps the finest concept derived from the Bill of Rights protections.

As you said earlier, Mr. Chairman, we must "Let Puerto Rico be Puerto Rico."

The CHAIRMAN. Thank you very much, Mr. Buchanan. Mr. Acle, you state in your statement that it would be wrong to allow Puerto Ricans in voting for the plebiscite to think that a language other than English can be the official language of a state of the United States. Do I take from that that your concern is that we not allow Spanish to be designated as the official language, as opposed to wanting to designate English as the official language?

Mr. ACLE. Mr. Chairman, we believe that it is necessary to recognize the reality stemming primarily from the fact that the Federal Government functions in English and it will continue to function in English and we believe that this is an opportunity to make a policy statement that indeed will increase the incentives and the motivations for the Puerto Rican population to continue pursuing the English language.

The CHAIRMAN. What I am getting at is, would it suit you and your group to be silent on the question of English and allow for a continuation of the status quo?

Mr. ACLE. Mr. Chairman, we are aware of the status quo and we believe that that certainly satisfies the requirement of our position. We believe that in the longer term we would have to recognize that indeed we may be moving toward the designation of English as the official language. It may happen all by itself.

The CHAIRMAN. I would suggest to you that there is a whole lot less here than meets the eye. That is, in practical terms you, as the group in the United States—and I want all the statehooders to listen to what he is saying. He is the group heading up the official language, U.S. language in the United States, and you are saying Mr. Acle that the status quo is suitable in Puerto Rico and you are not requesting at this time that we put English only language in this legislation.

Mr. ACLE. Mr. Chairman, I would like to clarify the characterization of the English only.

The CHAIRMAN. You are correct. Official language, yes.

Mr. ACLE. That is correct, Mr. Chairman. We do want there to be a statement of policy and in fact this is really behind our initiative both at the state levels and the federal level.

To make a statement of policy that indeed makes it necessary for government to also, for the sake of consistency, enhance the use of the English language and promote the acquisition of the English language skill and obtain an obligation to help every single American learn English.

The CHAIRMAN. I hope everyone will listen to what you are saying, because as I listen to it, you are not aggressively telling Puerto Rico it has to change. You are saying that English in America is a language that ought to be promoted, not foisted on someone, but promoted in the sense that we ought to teach it where it is available; that people ought to be given the opportunity to learn it, and that sort of thing, as opposed to grabbing somebody by the scruff of the neck and say you have got to speak in English from now on.

Mr. ACLE. Indeed, we believe they should be motivated. We believe that the Federal Government has a mission to turn this into a showpiece, and continue a tradition that, as has been mentioned, has been important to Puerto Ricans already.

I believe that the information that we have on, for instance, English language proficiency in Puerto Rico, is just a little tiny bit misleading. There are numbers, somewhere between 20 and 42 percent proficiency for the whole population. But if you were to look at separate groups—indeed, the very elderly are much less proficient in English, and the younger portion of the population is much more proficient in English, perhaps even over 50 percent for the working population. And the reason is that this is becoming incorporated as part of the educational system. We want to continue encouraging that. And beyond that, we would like to see even some instruction available for the elderly. We believe that acquiring English language skills is a worthwhile investment for the children, for the working adults and for the elderly as well.

The CHAIRMAN. But that should be on an optional basis, would not you agree?

Mr. ACLE. Oh, yes. We should make that available, and people should choose to do that on their own.

The CHAIRMAN. All right. Mr. Buchanan was talking about the 1904 law, where people were required to study English, and the dropout rate in school was great. And you are not suggesting that sort of thing?

Mr. ACLE. Mr. Chairman, we would emphasize the following. And that is it is not a legal requirement, but actually just simply a recognition of reality. And, indeed, 11 years out of the 12, children are taught English in the Puerto Rican system. We believe this should be continued, but it should be continued because it is a worthwhile investment in their education. They become so much richer by knowing English as well, not because it is a stipulation in law.

The CHAIRMAN. Now, Mr. Acle, in my state of Louisiana, I think Mr. Buchanan correctly said that, as a condition of coming into the Union, we were required to go to English. I was not in the Senate at that time. [Laughter.]

But it worked so well that now we have lost our French and we are trying to go back and teach French and import teachers. We do not even have the teachers in Louisiana who speak French, we have to import them from Canada and France. If you were so successful in Puerto Rico as to have the same situation, can you imagine that we would then have a council for the development of Spanish in Puerto Rico as we have a council for the development in French in Louisiana?

Mr. ACLE. Mr. Chairman, we favor the acquisition of English language skills, certainly not at the expense of any others. And we do not believe that people should be dissuaded from using, learning or perfecting Spanish. I am very pleased to be fluent in Spanish myself, and frankly I believe that this is an added dimension that may be particularly useful to the people of Puerto Rico because it would enhance their participation in foreign commerce, because of their physical proximity and their cultural ties with Latin America.

We believe that the acquisition of English language skills is an addition. It is an additional dimension of the enrichment of the culture of the people. And it does not require that anyone sacrifice language or that anyone be any less Puerto Rican.

The CHAIRMAN. So that you would share with me that Puerto Rico's cultural heritage, its language heritage, is a strong point on the island.

Mr. ACLE. And it is a precious resource; yes, indeed, and should be cultivated. Yes, indeed. And nothing is sacrificed by acquiring English language skills.

The CHAIRMAN. Well, I have been telling the statehood group that I think we ought to be silent in this legislation, that we ought to let things stay as they are. It is working. You, yourself, think it is working. Your group, which is the point group on English only, is not asking that we write it in this legislation to make Spanish the official language.

Mr. ACLE. We are asking, however, Mr. Chairman, if I may interrupt, that it be clarified; that this is part of reality. I think that you were quoted as saying that indeed, the people of Puerto Rico should know exactly what choices they are making. And part of reality is that certainly the Federal Government functions in English. And it should be recognized. It should not be just simply swept under the rug. If there is nothing wrong with verbalizing the fact that indeed, they are making progress. We are reducing the gap, but that indeed, we will continue to function in English.

The CHAIRMAN. Well, you see, the problem is that language is very much like religion. And there is a sensitivity in Puerto Rico to Spanish language. I mean, people do not want to feel if they become a state of the Union that suddenly they are not going to be able to communicate in Spanish, they are going to have to learn English. Things are going to change. It is going to be a cultural uprooting. I mean, there is a fear of that.

Now, you and I may think, well, there is no reason for that fear. That is not what I, Mr. Acle, am asking for. And you are not. And I am glad to have you here and make that clear. I mean, you share with me the view that Spanish is an asset in Puerto Rico; it is not a detriment.

But if we go putting something in this legislation, either way, Spanish the official language or English the official language, it only tends to highlight that which should not be highlighted. Things are working very well right now. Why fix something that is not broke, to use the phrase?

Mr. ACLE. For the following reason, Mr. Chairman. Learning English is not a trivial task. I learned English as a teenager, and let me tell you that I sympathize with those that are going through the process of learning a new language, and English is certainly not one of the easier ones. And people need motivation and encouragement. I think that if there is this notion that we are not going to need the English language, it may be easier to become discouraged and abandon the project.

And I think that because of the difficulty of acquiring English language skills, it is a good idea to give people all the encouragement possible, including with a policy statement that says English will continue to be the official language of government.

The CHAIRMAN. Well, why not, instead of policy statements about what is or is not official, why should not your group just encourage more funds for education?

Mr. ACLE. We do.

The CHAIRMAN. Well, it seems to me that that ought to be the emphasis, because frankly, we ought to teach more English in my state—in all states.

Mr. ACLE. We agree. We agree. And in fact, this is the natural result of the policy statement that I was arguing in favor of just a minute ago. Because once we have that kind of policy statement, then it follows logically that we should implement that kind of policy by making English language instruction available to every American.

The CHAIRMAN. You see, there is a feeling—and I am glad to have you here in the flesh—I have said that about four times, but I repeat it, because I think you show a person who wants to celebrate the English language, help it, promote it, and you are not anti any other culture or any other language.

Mr. ACLE. That is correct.

The CHAIRMAN. But, unfortunately, some people interpret the English-only movement as being anti-foreign, sort of the feeling that they do not want these other people, really, to participate, and this is one way to sort of get at them. And you are here to say that that is not so.

Mr. ACLE. That is not so. Mr. Chairman, unfortunately, I think that when opponents run out of good, legitimate, logical arguments, perhaps there is a tendency to attack those who support—there is no basis for that. There is no hostility. We are happy to promote the use of the English language, and in this particular context, because we believe that it would be a wonderful investment for the people of Puerto Rico who would become even more able to enjoy the economic miracle of this country.

Everyone knows that, indeed, Hispanics in the United States who are not able to function in English, on average, make less than half the income of Hispanics in the United States who function in English. We would like to help people overcome that handicap. And the best way to do that would be by equipping them to function in the English language.

The CHAIRMAN. All right. But, again, to repeat, you are not asking for any requirement of official language or anything other than a hortatory statement that English should be continued as at present in Puerto Rico?

Mr. ACLE. That is correct, sir. We would be very happy to see a very strong policy statement—and the stronger the better. And again, because it supports, undergirds, in fact, additional legislation in support of, for instance, the activities to help people learn English. And I suppose that there would be ample room for the Federal Government to initiate and fund instructional activity for children, adults and retirees.

The CHAIRMAN. Now, Mr. Buchanan, you have served as a member of the Congress. I have told the statehooders that I think we ought to be silent here, that we should not have language saying that English or Spanish is the official language of Puerto Rico.

Do you agree with me that by doing so we could sort of avoid a fight where there is nothing to fight over?

Mr. BUCHANAN. Mr. Chairman, that might be the case. And if, in the Committee's wisdom, it sees fit to leave out this language, I do think that you ought not to have language that would further fuel the fires of concern in Puerto Rico; that the particular choice of statehood, for example, would result in being the English requirement.

It would seem to me, instead, I would ask the opposite of what my friend here asked, not a strong policy statement such as he suggests, rather I would say that if you remove the language from the legislation, it would be very helpful if there could be report language underlining the intent of the Committee to leave the status quo as is, and statements by the Chair and other members of the Committee which would reassure the people of Puerto Rico that you are not imposing, by fiat, English upon a people who are 98 percent Hispanic and who have great desire already—they are already in their schools getting 11 years of English.

There is, as is true in the mainland United States, significant desire on the part of Hispanic and other Americans to learn the English language. I understand their concerns, Mr. Chairman, because some 17 states have passed English-only requirements, by now. And that is the reason for such concern. If my friend here would adopt the same policy toward the 50 states that are already states that he has toward Puerto Rico, I would be very happy. And I wish he would.

Mr. ACLE. We recognize there are differences.

Mr. BUCHANAN. Certainly, there are differences. But we are growing—we have always been diverse and pluralistic, and we are increasingly so.

Mr. Chairman, before I forget, I have in my hand statements from the National Puerto Rican Coalition and another statement from the Mexican-American Legal Defense and Educational Fund, which I would commend to the attention of the Committee, and I would appreciate if they could be included in the record.

The CHAIRMAN. Yes, without objection.

[The information referred to follows:]

STATEMENT BY
THE NATIONAL PUERTO RICAN COALITION
TO THE
COMMITTEE ON ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE

14 July 1989

Ramon E. Daubon
Vice President

ON THE ISSUE OF IMPOSING THE ENGLISH LANGUAGE TO PUERTO RICO AS A CONDITION FOR STATEHOOD

THE NATIONAL PUERTO RICAN COALITION (NPRC) IS A MEMBERSHIP ASSOCIATION OF 84 PUERTO RICAN ORGANIZATIONS AND OVER 600 COMMUNITY LEADERS DEVOTED TO THE ECONOMIC SOCIAL AND POLITICAL ADVANCEMENT OF PUERTO RICANS. ITS PRIMARY FOCUS OF ACTIVITY IS THE US PUERTO RICAN COMMUNITY; NEVERTHELESS, IT WILL PARTICIPATE IN DISCUSSIONS CONCERNING ISSUES OF THE ISLAND OF PUERTO RICO WHEN THESE HAVE A BEARING ON THE STATESIDE COMMUNITY.

THE RECENT DEBATES IN THE CONGRESS AND THE MEDIA CONCERNING THE PLEBISCITE ON THE FUTURE POLITICAL STATUS OF PUERTO RICO HAVE RAISED SEVERAL SUCH ISSUES. ONE, OF GREAT IMPORTANCE TO US PUERTO RICANS, IS THE MATTER OF AN "OFFICIAL" DETERMINATION OF ENGLISH AS THE LANGUAGE OF THE ISLAND AS A CONDITION FOR STATEHOOD. INDIVIDUAL PUERTO RICANS IN THE US MAY HARBOR PREFERENCES FOR OR AGAINST THE LATTER AS A PREFERRED STATUS OPTION FOR THE ISLAND. NPRC'S CONCERN, NEVERTHELESS, REFERS TO THE LANGUAGE PRECONDITION ALONE. BY IMPLYING THAT ENGLISH IS THE ONLY LANGUAGE OF FULLY PARTICIPATING AMERICANS, IT EFFECTIVELY DISENFRANCHISES THOSE WHOSE PRIMARY LANGUAGE IS ANOTHER.

IT IS A MISTAKE, NPRC STRONGLY BELIEVES, TO AFFIRM THAT AMERICANS SPEAK ONLY ENGLISH. OUR COUNTRY, LIKE MANY OTHERS, IS MULTILINGUAL AND MULTICULTURAL. THIS VARIETY IS AN ASSET, IT IMMENSELY ENRICHES OUR AGGREGATE CULTURE AND THE POSSIBILITIES FOR HUMAN CREATION THAT IT ENGENDERS. AS SUCH IT SHOULD BE APPRECIATED. BUT MOREOVER, THIS VARIETY IS ALSO A HUMAN RIGHT. AS SUCH IT MUST BE RESPECTED.

THE RIGHTS OF LINGUISTIC AND CULTURAL MINORITIES IS RECOGNIZED BY INTERNATIONAL LAW AND IN PROTOCOLS SIGNED BY THE UNITED STATES. THE PRESENT SITUATION OF ETHNIC TURKS IN BULGARIA AND ETHNIC HUNGARIANS IN RUMANIA, SAD CURRENT EXAMPLES OF IMPOSING "OFFICIAL" CULTURES, IS A VIOLATION OF THAT RIGHT.

TO MAKE ENGLISH THE ONLY "OFFICIAL" LANGUAGE OF THESE UNITED STATES, THUS RESTRICTING THE USE OF PUBLIC RESOURCES FOR CITIZENSHIP SERVICES IN OTHER LANGUAGES, VIOLATES THE HUMAN RIGHT OF LANGUAGE MINORITIES TO FULLY EXERCISE THEIR CITIZENSHIP IN THE LANGUAGE AND CULTURAL CONTEXT OF THEIR PREFERENCE.

PUERTO RICANS ARE BORN CITIZENS OF THE UNITED STATES. THEY ARE NOT IMMIGRANTS. THEY MOVE ABOUT WITHIN THE NATIONAL TERRITORY AS ANY CITIZEN WOULD. WHEN THEY DO, THEY CARRY THEIR LANGUAGE AND THEIR CULTURE. AND WHEN THEY CONCENTRATE IN NUCLEI OF SUFFICIENT SIZE TO OVERCOME THE OBVIOUS PRACTICAL DIFFICULTIES OF A DISPERSED POPULATION, THEY SHOULD BE SERVED BY THEIR STATE

IN THE LANGUAGE OF THEIR PREFERENCE.

PUERTO RICANS ARE NOT THE ONLY LANGUAGE MINORITY IN THIS COUNTRY. MEXICAN AMERICANS IN THE SOUTHWEST AND THE NATIVE AMERICAN NATIONS THROUGHOUT THE COUNTRY WERE THERE BEFORE THE COUNTRY WAS THERE. TO DENY THEM THE RIGHT TO BE SERVED BY THE STATE IN THEIR OWN LANGUAGE IS AN OUTRAGE.

IMMIGRANTS ARE A DIFFERENT ISSUE. BUT THAT IMMIGRANTS WOULD CONGREGATE AT THE CENTERS OF CITIZEN POPULATIONS OF THEIR OWN ETHNIC BACKGROUND IS TO BE EXPECTED. THAT THIS WOULD NOURISH AND STRENGTHEN THE CULTURE OF THOSE CENTERS SHOULD NOT BE CAUSE FOR CONCERN BY THE MAJORITY POPULATION. ENGLISH IS DE FACTO THE WORKING UNIVERSAL LANGUAGE OF THE UNITED STATES. IMMIGRANTS REALIZE THIS AND STRIVE TO PERFECT THEIR ENGLISH LANGUAGE SKILLS AS A MAJOR PRIORITY. ADULT ENGLISH LANGUAGE PROGRAMS THROUGHOUT THE NATION ARE TYPICALLY STRETCHED TO BURSTING. ESOL PROGRAMS (ENGLISH FOR SPEAKERS OF OTHER LANGUAGES) ARE TYPICALLY UNDERFUNDED AND LONG WAITING OR REJECTION LISTS ARE COMMON.

IT IS A FALLACY THAT PREVIOUS MIGRANTS TO THIS COUNTRY LEARNED ENGLISH ANY SOONER. GERMAN IMMIGRANTS KEPT THEIR LANGUAGE AS A FIRST LANGUAGE FOR GENERATIONS IN THE UPPER MIDWEST. THE OFTEN HEARD COMPLAINT THAT "MY GRANDMOTHER CAME HERE FROM ITALY (OR RUSSIA, OR POLAND, OR...) AND SHE LEARNED ENGLISH" IS FALSE. IMMIGRANTS WHO ARRIVED AS ADULTS AS A RULE

WENT TO THEIR GRAVE AND SPOKE ENGLISH ONLY HALTINGLY. ONLY WHEN GRANDMA CAME HERE AS A CHILD DID SHE PICK UP ENGLISH FLUENTLY.

PRESENT IMMIGRANTS ARE NO DIFFERENT. THEIR CHILDREN ARE QUICKLY INCORPORATING THE AMERICAN LANGUAGE AND CUSTOMS. IN FACT, A COMMON LAMENT OF MIGRANT PARENTS IS THE CULTURAL DISTANCING OF THEIR CHILDREN. MAKING CITIZEN INFORMATION AND SERVICES AVAILABLE IN THEIR LANGUAGE WILL NOT IN THE LEAST DIMINISH THE THIRST OF IMMIGRANT CHILDREN FOR INTEGRATION AND ACCULTURATION, OR THE PERCEIVED NEED OF THEIR PARENTS TO FUNCTION IN ENGLISH IN THE LABOR MARKET. IT WILL, HOWEVER, FACILITATE THE INCORPORATION OF THESE PERSONS INTO THE CIVIC DIALOGUE THAT IS THE LIFEBLOOD OF THIS REPUBLIC.

THAT, WE FEAR, IS PRECISELY THE REASON WHY SOME ELEMENTS IN OUR SOCIETY WOULD MAKE ENGLISH THE ONLY "OFFICIAL" LANGUAGE, AND WOULD OPPOSE PROVIDING THESE SERVICES AND INFORMATION. THAT LANGUAGE MINORITIES OF AMERICANS WOULD EXERCISE THEIR CITIZENSHIP IN A LANGUAGE OTHER THAT ENGLISH, AND ALSO BRING IMMIGRANTS INTO THE PROCESS, _IS_ OF CONCERN TO SOME. LANGUAGE MINORITIES WERE IN FACT RESTRICTED FROM PARTICIPATION IN THE PAST. WHAT WE NOW PLACE IS THE WEIGHT OF OUR CITIZEN RIGHTS IN THE PATH OF SUCH OBSTRUCTION.

MOREOVER, THE "ENGLISH ONLY" MOVEMENT IS CLEARLY DIRECTED MAINLY AGAINST HISPANICS. IT HAS TARGETED THE STATES WITH

PROPORTIONATELY LARGEST HISPANIC POPULATIONS, AND HAS CLEARLY PLAYED ON THE XENOPHOBIC FEARS THAT NORMALLY ARISE IN MAJORITY COMMUNITIES WHEN THE NUMBERS OF MINORITIES SURPASS A CERTAIN CRITICAL MASS. AS PUERTO RICANS, IT THUS AFFECTS US ESPECIALLY CLOSE. CLOAKED IN INNOCENCE AND THE PRACTICALITY OF A COMMON VEHICLE OF COMMUNICATION, THE MOVEMENT EMBODIES THE PREJUDICE AND INTOLERANCE FOR DIVERSITY WHICH THIS GREAT NATION HAS EXPERIENCED, AND VANQUISHED, IN THE PAST. THAT "ENGLISH ONLY" ADVOCATES MAY PRODUCE SOME HISPANIC INDIVIDUALS TO PURVEY THAT INTOLERANCE IS NOT SURPRISING, IF NOT FOR THAT LESS PATHETIC.

ALSO, THE RECENT ACCEPTANCE BY THESE ADVOCATES OF THE "OFFICIAL BILINGUALISM" SOLUTION OF HAWAII IS DECEIVING. THERE IS A GREATER PROPORTION OF SPANISH SPEAKERS IN THE US SOUTHWEST THAN OF HAWAIIAN SPEAKERS IN THOSE ISLANDS. THE GESTURE THERE WAS ONE OF SYMPATHY TO PROTECT THAT NATIVE TONGUE FROM EXTINCTION. YET "ENGLISH ONLY" DID NOT ADVOCATE FOR BILINGUALISM IN CALIFORNIA; THERE, IT WAS ONLY FOR ENGLISH.

LANGUAGE AND CULTURAL MINORITIES NEED NOT PROVE THEIR DEVOTION TO THIS COUNTRY BY SACRIFICING THAT WHICH MAKES THEM UNIQUE. THESE MINORITIES HAVE ALWAYS PAID A DISPROPORTIONATE SHARE OF THE NATION'S DEBT OF BLOOD; THEIR NAMES ARE DISPROPORTIONATELY PRESENT IN THAT BLACK GRANITE WALL IN FOGGY BOTTOM. TO DENY THEM THE RIGHT TO BE THEMSELVES AND FULLY BENEFIT FROM THE SERVICES OF A GOVERNMENT THAT THEY'VE SO LOYALLY

DEFENDED, IS AN INDIGNITY.

IF PUERTO RICANS, WHEREVER THEY MAY BE, AND IN THE FREE EXERCISE OF THEIR GOD-GIVEN RIGHT TO SELF DETERMINATION WERE TO OPT TO FORMALLY CONSTITUTE THEMSELVES AND REQUEST ADMISSION AS A STATE OF THIS UNION, THEY MUST BE PERMITTED TO DO SO IN THEIR INTEGRITY AS A PEOPLE: WITH A LANGUAGE AND A CULTURE. TO EVEN SUGGEST A LESS THAN FULL EXPRESSION OF THAT INTEGRITY BY IMPOSING A CULTURAL PRECONDITION, IS AN AFFRONT TO EVERYTHING AMERICAN.

TO IMPOSE AN OFFICIAL LANGUAGE AND CULTURE ON THIS NATION WAS UNNECESSARY IN THE PAST WHEN AN EVEN LARGER PROPORTION OF OUR POPULATION WERE MIGRANTS. TO DO IT NOW IS AN ABERRATION.

THANK YOU.

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MALDEF

An Open Letter To

The Committee on Energy and Natural Resources

From

Martha Jimenez, Esq.
Policy Analyst
Mexican American Legal Defense and Educational Fund

Regarding
Official English and the Commonwealth of Puerto Rico

July 14, 1989

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Dear Chairman Johnston and Distinguish Members of the Committee:

Today, the Committee on Energy and Natural Resources will hear testimony on the issue of language use in the Commonwealth of Puerto Rico. While the Mexican American Legal Defense and Educational Fund (MALDEF) takes no position on the status of Puerto Rico, we are, nonetheless, extremely concerned that English may be made a requirement or condition of statehood irrespective of its potential effect upon people of Puerto Rico.

As a national civil rights organization devoted to the protection and advancement of the civil and constitutional rights of Hispanics and other language minorities in the United States, MALDEF has had extensive experience with the official English issue and the English-only advocates behind this effort.

Official English Efforts Have Fueled Anti-immigrant Sentiment, Fear and Hatred Against Spanish-Speaking Americans and the Expansion of Both Public and Private Discriminatory Activity

Currently, sixteen ~~(16)~~ states have designated English as their official language (Hawaii recognizes English and Hawaiian as official languages). Last year, after a divisive and highly charged campaign, three states, Arizona, Colorado and Florida, enacted English language amendments to their constitutions. Today, four English language amendments to the U.S. Constitution are pending before the House Subcommittee on Civil and Constitutional Rights.

The apparent innocuousness of these measures do not begin to reflect the hostility, resentment and divisiveness they engender. So vague as to be virtually limitless, private individuals and businesses have taken it upon themselves to implement and to enforce these English-only laws. For example:

> *Shortly after the passage of the official English law in Arizona, Hispanic inmates were denied parole board hearings. Since these hearings were required to be conducted in English-only, and the state refused to provide interpreters, Hispanic inmates were denied fundamental due process rights. Tucson Citizen, 12/22/88.

> *The passage of the English-only law in Florida generated a flood of complaints of discriminatory activity directed at the language minority population by private businesses and individuals. For example, a cashier at a Publix supermarket was suspended for asking a fellow employee a question in Spanish. This resulted in protests and a

> boycott of the store. Also, customers who had previously been allowed to place catalogue orders in Spanish in the past were now being refused; and even telephone collect calls were not being connected if the receiving party did not speak English. The Christian Science Monitor, 11/29/88.
>
> *Apart from the actual discriminatory activity generated by English-only legislation, such legislation begets more restrictive measures. Indeed, the English-only bill introduced in the Suffolk County legislature this year would have prohibited the use of county funds for purposes of investigating complaints or practices of language discrimination resulting from the bill. Res. No. 10001-89.

Language Diversity Has Never Been An Impediment to Statehood

In America, democracy rather than language is the glue that keeps us together. Congress itself has recognized the benefits of pluralism and diversity in our nation by naturalizing large numbers of non English-speaking peoples of Louisiana, Florida, the Southwest and Puerto Rico. Our Founding Fathers specifically rejected the concept of making English the official language of the country as undemocratic and divisive. Of the discussions held by the Continental Congress on this issue, noted historian Shirley Brice Heath writes:

> "Recognizing that forces which cause one to change his language or add to it must be internally motivated initially, leaders reasoned that linguistic minorities would not become separate and distinct peoples within the nation so long as no legal force proscribed the use of their languages. Moreover, wide use of the majority language would come without coercion: linguistic minorities would recognize within their own schools, societies and "little colonies: the importance and utility of English...if a national government should legally pressure groups to abandon their native languages, the repression of these tongues and separate unities could provoke resistance." Heath, A National Language Academy, p.14-15; (emphasis added).

The states of California, New Mexico, Texas, Colorado, and Louisiana all provided under their state constitutions for the publication of official documents in English and the native language of predominant use.[1] Similarly, in Puerto Rico today, official documents are required to be available in English.

In light of the great contributions of multilingual and multicultural people to the growth and vitality of the United States, and the fact that Puerto Rico already recognizes the importance of English as described above, we must question the benefit to be derived or the purpose to be served by requiring English-only legislation for Puerto Rico.

Languages, especially the 500 year history of the Spanish language in Puerto rico, is inextricably linked with the culture, customs, beliefs, aspirations, self-identity and self-esteem of the people of Puerto Rico. The issue of language in Puerto Rico is not an issue that can be taken lightly or easily dismissed; rather, it is an issue that requires careful and thoughtful consideration.

MALDEF urges this Committee to carefully explore all the potential ramifications to the culture and society of the people of Puerto Rico should English be imposed as an obligation or requirement of statehood. MALDEF and other organizations that share our concerns, stand ready to assist the Committee in this endeavor.

Sincerely,

Martha Jimenez

Martha Jimenez, Esq.
Policy Analyst

July 14, 1989

ENDNOTES

1. See, e.g., Cal. Const. art. XI (1849) (mandating that all laws, decrees and other official documents be published in English and Spanish); N.M. Const. art. XII, XIX, XX (1912) (mandating training for bilingual teachers, requiring that all future constitutional amendments be printed in English and Spanish, requiring that all new laws be printed in both English and Spanish); Tex. Const. (1845) (printed in both German and Spanish); Colo. Const. art. XVIII, sec. 8 (1876) (requiring that all laws be published in Spanish and German until 1900). See also Kloss, American Bilingual Tradition, Rowley, Mass: Newbury House Publishers, at 112, 129, 179, 181 (1977).

The CHAIRMAN. We have just voted, I think it was yesterday, maybe it was the day before yesterday, on an amendment to the Immigration Act, which would have—I forget exactly how the amendment went, but the thrust of it was that somebody wanted to grant a preference to those who speak English who are applying for immigration to the United States. And that was killed. I voted against it. And I think the feeling of those of us who did was, while yes, a facility in English is greatly to be desired, greatly to be encouraged, that it should not be a measure of your ability, your right to emigrate to the United States. We do not want that anywhere in the test.

And I think that speaks volumes about the attitude of the United States Senate toward requirements for English. And so I reiterate my feeling to my friends from the Statehood Party that I think we ought to be silent on this.

I think your attitude toward this is a very good one, Mr. Acle; I think probably misunderstood by some of the statehooders. That is why it is good to have hearings. People, I think, who want English only—excuse me—I keep saying the wrong thing—who want English as the official language, are trying to encourage English, not to force it or foist it on somebody.

And I think I have been very reassured about what you have had to say, and about the way you, and I assume your organization, approaches this. And I hope the people of Puerto Rico are as well.

Senator McClure.

Senator MCCLURE. Thank you for your line of questioning. I have only one difference of opinion with that, which has been expressed by the Chairman. I do have that difference I believe, as has been stated here, that English proficiency is an important asset to any person who wishes to live and do business in the United States. I would say that is true of any foreign citizen who lives in the United States. He probably knows he will do more business if he speaks English and seeks English proficiency in order to do that.

I notice that Japanese managers of new plants built in the United States, even though they may be Japanese managers, they learn a proficiency in English to come here to manage. And they could not manage nearly so well if they did not.

I notice most of the diplomatic corps stationed in the United States are measured, to a degree, in their proficiency as to whether or not they can conduct business in English. And that is something of a test of our own diplomatic personnel. As they go into foreign countries they learn to speak the local language, not because there is a law that says they have to, but because it makes good sense that they do.

I do not disagree with the idea that injecting into this bill the question of any mandate, with respect to language, is going to complicate the passage of the bill. I do not have any doubt that that issue, whether we put it in the bill or not, will complicate the job that we have with respect to the acceptance by the Congress of this legislation. It is going to be discussed, and it will be a matter of discussion and concern to members of the Congress, regardless of whether we are silent or not. We will get into that debate, one way or the other.

I would also say that unlike my friend, the Chairman, who voted against the amendment on the floor of the Senate, I voted in favor of that amendment, because I do believe that it is important that we signal at some point the fact that English proficiency is important for integration into our society.

And I noticed, Mr. Acle, you winced a few times during the statements being made by the Chairman, because he referred to English only. And I only reiterate that because that is not your title and that is not your purpose.

Mr. ACLE. That is right. And it sends the wrong message. Our mission is not to preclude anyone from using any other language for any private purpose; our mission is specifically to have the English language recognized as the official language of government—only of government. And if anyone, for business reasons, or promotional reasons, or religious reasons, cultural reasons, whatever, would choose another language in private communications, we have absolutely no objection to that.

Senator MCCLURE. I cannot let the opportunity go by without saying welcome to my friend Congressman Buchanan, with whom I served with in the House of Representatives. I have a very deep affection and respect for you, John, and I think you know that.

I do want to ask one question, however. If we remain silent, as has been suggested, I do not suppose we want to send signals to anyone that that means an official change of policy with respect to the rules that require the use of English in the federal courts? Do you have a feeling with respect to that?

Mr. BUCHANAN. Well, I would say that is one of the arguments against your placing any kind of policy statement or any requirement in this legislation. English is used in the courts. We have 11 years of English in the schools. Puerto Rico is increasingly bilingual. I hope it will remain so. I will say to my distinguished friend—and I could certainly turn around what he said about me—I am one of his great admirers—that we ought to look at what the Chairman mentioned a minute ago about Louisiana, about losing precious resources. Those Japanese businessmen, you do see anywhere you go on Earth, speaking the language, understanding the culture, and doing business. And I am afraid we are at a competitive disadvantage precisely because we have done too little in international education, and we have not retained these precious resources of other languages well enough in our society.

I think we indeed need greater emphasis on doing all the things we can to retain that language capability.

Senator MCCLURE. I do not think there is any disagreement by your colleague at the table or either of us up here with respect to that. I might note parenthetically that I rather suspect the pace of integration of the French-speaking people of Louisiana into the United States was hastened by that provision.

The CHAIRMAN. If the Senator would yield. Staff just whispered in my ear that your top staffer and one of mine would not be here if we had the English-only requirement for immigration. Because their forebears did not speak a word of English when they came here.

Senator MCCLURE. I understand that. But, again, I do not want to debate the amendment that was on the floor. That was not what that amendment said. My forebears could not have come to this country either under a test that required them to have any money before they came here, because they did not.

And like many immigrants to this country, they arrived here penniless. And they had only the strength of their backs and their willingness to work and their ability to work that allowed them to become citizens of this country. And yet we do have, in the immigration statutes of this land today, some requirements and some preference with respect to those who have monetary means at their disposal. So I do not see that English proficiency is an asset in immigration any more than English proficiency is an asset in citizenship.

And we still require English proficiency at the time of naturalization—some minimal proficiency. And I do not think that either of the witnesses here want to eliminate that. I just want to make certain that if indeed we are neutral on this question in this bill, we do not lose either. Our struggle really is to find a way to express what both of you are saying; that English is the official language of this country as a matter of fact. And that if you hope to be able to participate in this government, you must have a proficiency in English. And at the same time say, however the maintenance of cultural diversity is very, very important to us.

I have, in my state, the largest Basque contingency in any state of the Union. And those Basque people are marvelous citizens of our country. They militantly defend their own culture, and I applaud that. In my own area of my state, we have Spanish festivals every year, as people who are Hispanic maintain their cultural identity. And I applaud that.

But if they spoke Spanish only, they could not very well live in my state. They would not be able to get along in the business world. And that does not say I am trying to eliminate their Spanish heritage. I want to maintain that. But I think we need to find a way in which we say both things, not one or the other. And I have certainly worked toward that in whatever expressions we carry forward in this legislation.

I want to thank you both.

The CHAIRMAN. Thank you very much, Senator McClure.

Gentlemen, thank you. I think this has been a very good exchange this morning. As far as I am concerned, the people of Puerto Rico should be reassured that they have nothing to fear from either one of you or either one of your groups.

Thank you very much.

[Whereupon, at 11:57 a.m., the hearing was adjourned.]

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